Supreme Court, U.S.
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No. 01 531

IN THE

Supreme Court of the United States

FARM & GROVE REALTY COMPANY,

Petitioner

v.

BREVARD COUNTY, FLORIDA,
THE NATURE CONSERVANCY,
and KEVIN JUDD,

Respondents.

On Petition for Writ of Certiorari
to the Fifth District Court of Appeals
for the State of Florida

PETITION FOR WRIT OF CERTIORARI

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41 pp

QUESTIONS PRESENTED

(1) Whether "viable usefulness and economic value" of land affected by ordinances that allegedly violate the landowner's rights of Equal Protection is a valid basis for dismissing the landowner's equal protection claims.

(2) Whether Petitioner Farm & Grove Realty's as-applied and facial Equal Protection claims were subject to a failure-to-state-a-claim dismissalbased on a finding that "real doubt is cast upon whether Plaintiff's asserted Claim is ripe for determination as a result of any dispositive action by [Brevard County]," despite allegations and evidence that Respondent Brevard County, the relevant governmental authority, has made a final decision adverse to the claimant's property rights and that the governmental authority's action was arbitrary, capricious, and a thinly disguised method to create an unfair, illegal, and confiscatory tax or condition upon Petitioner's property which results in a permanent inordinate burden thereon.

(3) Whether Respondent Brevard County's new ordinances and other actions deny Equal Protection -- both facially and as applied -- in requiring Petitioner Farm & Grove Realty and other lone property owners, desiring to obtain a building permit for the property, to construct a costly road to the property that would greatly and directly benefit adjoining property owners, while the ordinances also abolish the only effective means of cost-sharing or equitable contribution for the cost of the road among all property owners directly benefitting from the construction of the road.

(4) Whether Florida's post-deprivation remedy of a state lawsuit for a taking by inverse condemnation is inadequate because Petitioner Farm & Grove Realty's state claim for inverse condemnation cannot be brought against Respondents The Nature Conservancy and Kevin Judd, private entities acting in the role of state actor.

(5) Whether Florida's inverse condemnation remedy is inadequate because Petitioner Farm & Grove Realty's state claim for inverse condemnation cannot be tried before a jury.

(6) Whether Florida's inverse condemnation remedy is inadequate in forcing mitigation sales, somewhat analogous to Transferable Development Rights (TDRs), of Petitioner Farm & Grove Realty's land in a mitigation market created and controlled by Respondents because such mitigation sales constitute less than just compensation and cannot be the basis for a tract of land's economic value when that land's open-market economic value has been eliminated by regulatory and other actions of those same Respondents.

(7) Whether the Florida court of last resort decided Petitioner's conspiracy claims under 42 U.S.C. S 1983 in a way that conflicts with decisions of this Court.

CORPORATE DISCLOSURE STATEMENT

Farm & Grove Realty Company has no parent corporation, and no publicly held company owns more than 10% of Farm & Grove Realty Company's stock.

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OPINIONS BELOW

The opinions of the Fifth District Court of Appeals of Florida and the Eighteenth Judicial Circuit Court of Florida are unreported but are included in the Appendix to this Petition at AI-3, AI-5, AI-7, AI-9, and AI-10. (Volumes of Appendix are cited as AI and AII, followed by the page number where the cited material begins.) The Fifth DCA decision is published in a table without reported opinion at 785 So. 2d 498 (Fla. App. 2001).

JURISDICTIONAL STATEMENT

The order sought to be reviewed was entered on April 17, 2001. The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question is 28 U.S.C. § 1257(A).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

U.S. Const. amend. V (Full text at AI-13.)
U.S. Const. amend. XIV (Full text at AI-13.)
Brevard County Ordinance 80-50 (Full text at AI-14).
Brevard County Ordinance 91-08 (Full text at AI-18).
Brevard County Ordinance 91-12 (Full text at AI-25).
Brevard County Ordinance 93-27 (Full text at AI-50).

STATEMENT OF THE CASE

On March 20, 1996, Petitioner Farm & Grove (F&G), filed an action against Respondent Brevard County for declaratory and other relief regarding the alleged regulatory taking of a single parcel of F&G's property, known as Tract 184, in Cape Kennedy Estates, through the inequitable application of road regulations (The Road Suit), trial court Case No: 96-4509-CA. The Road Suit included the following counts: I. Declaratory Relief; II. Fifth/Fourteenth Amendment Takings Claim; III. Fifth/Fourteenth Amendment Due Process Claim; IV. Fifth/Fourteenth Amendment Violation by Arbitrary and Capricious Conduct; V. Fifth/ Fourteenth Amendment Violation of Equal Protection Rights; VI. 42 U.S.C. 1981 et seq. for Denial of Civil Rights; and VII. Violation of Florida Constitution, Article 1, Sections 2, 9, and 10. The County filed a Motion to Dismiss, and on July 16, 1996, the trial court granted that Motion as to all counts but Count I.

On September 4, 1996, F&G filed a separate Complaint against Brevard County, The Nature Conservancy (TNC), as

acquisition agent for and co-conspirator with the County, and Kevin Judd (Judd), as acquisition agent for and co-conspirator with TNC and the County, and individually (trial court Case No: 96-14296-CA, the Takings Suit.). This Complaint originally included the following counts: I. Inverse Condemnation/ Constitutional Taking; II. 42 U.S.C. § 1983 for unconstitutional taking and conspiracy; and III. Illegal Monopoly and Restraint of Trade.[1] First and Second Amended Complaints added a Count for Civil Conspiracy.

All Defendants moved for summary judgment. On April 29, 1999, the trial court entered an order granting in part and denying in part the motions for summary judgment. The summary judgment was granted as to Counts II and III for 1983 claims and for conspiracy, which were the only counts in which TNC and Judd were named as Defendants. The summary judgment was denied as to Count I for inverse condemnation, for which the County was the only Defendant. The order granting summary judgment was appealed to the 5th DCA in District Court Number 99-2355 because the order disposed of TNC and Judd as parties in the case.

In the meantime, at the request of the County, the Road Suit and the Takings Suit had been consolidated on March 5, 1999. The case went to trial on the remaining count in the Road Suit, which was Count I for declaratory relief, and the remaining count in the Takings Suit, which was for inverse condemnation. The only Defendant at the time of trial was the County.

The trial in this matter was a bench trial, and was decided solely on the issue of whether or not a taking had occurred. On February 7, 2000, the trial court entered its final judgment in this case ruling in favor of the County. On February 28, 2000, F&G timely filed a Notice of Appeal to the 5th DCA in District Court Number 00-649. The 5th DCA consolidated the two appeals, and on April 17, 2001, affirmed all issues on appeal per curiam without an opinion. Because all issues were affirmed per curiam on appeal without an opinion, F&G could not petition to the Florida Supreme Court for certiorari review, and the 5th DCA's per curiam affirmance (P.C.A.) of the trial court was a final

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[1]This Count was dismissed on a motion to dismiss that is not the subject of this Petition.

judgment in a state court of last resort.

Regarding questions presented 1 through 3, Petitioner's claim for violation of its Equal Protection rights, this claim was first brought in the trial court in Count V of Petitioner's Complaint in the Road Suit (Case No. 96-4509-CA), which Complaint is in the Appendix of this Petition at AI-60. The trial court dismissed all but one count of this Complaint, including Petitioner's Equal Protection Count in an Order in the Appendix at AI-3. The dismissal of Petitioner's Equal Protection Count was appealed by Petitioner to the 5th DCA in District Court case number 00-649. The portion of Petitioner's appellate briefs preserving the Equal Protection claim for this Court's review on Petition for Writ of Certiorari are in the Appendix to this Petition at AII-59. The 5th DCA issued its P.C.A. of the trial court's dismissal on April 17, 2001, set out in the Appendix at AI-9.

As to question presented 4 regarding whether Florida's post-deprivation remedy of a state lawsuit for inverse condemnation is inadequate because a landowner cannot sue a private entity state actor for a taking, this issue goes to whether or not Petitioner's Fifth Amendment taking claim against all Respondents was ripe. Petitioner's Fifth Amendment taking claim against all Respondents was presented as Count II of the Second Amended Complaint in the takings case (Case No. 96-14296-CA), which is in the Appendix at AII-2. The issue of the ripeness of Petitioner's Fifth Amendment takings claims was raised by all Respondents in their Motions for Summary Judgment, the relevant portions of which are quoted in the Appendix at AII52-54. The trial court entered an order granting the Respondents' Motions for Summary Judgment as to the federal takings claim (Count II) on April 29, 1999, which is set out in the Appendix at AI-5. The Petitioner filed a Motion for Rehearing on the trial court's order granting summary judgment, which Motion for Rehearing was denied. The Motion for Rehearing is set out in the Appendix at AI-72, and the Order denying rehearing is set out in the Appendix at AI-7. The Petitioner appealed the trial court's grant of summary judgment to the 5th DCA in Case No. 99-2355, and the issue of the inadequacy of the state remedy because Petitioner could not sue Respondents TNC and Judd was raised in Petitioner's Initial Brief and Reply Brief in that appeal. The relevant portions of the

Initial Brief are quoted in the Appendix at AII-54. The 5th DCA issued its P.C.A. of the trial court's dismissal on April 17, 2001, set out in its entirety in the Appendix at AI-9.

As to question presented number 5, regarding whether Florida's post-deprivation remedy of a state lawsuit for inverse condemnation is inadequate because a landowner in not entitled to a jury trial on the issue of whether a taking occurred, this issue goes to whether or not Petitioner's Fifth Amendment taking claim against all Respondents was ripe. Petitioner's Fifth Amendment taking claim against all Respondents was presented as Count II of the Second Amended Complaint in the takings case (Case No. 96-14296-CA), which is set out in the Appendix at AII-2. The issue of the ripeness of Petitioner's Fifth Amendment takings claims was raised by all Respondents in their Motions for Summary Judgment, the relevant portions of which are quoted in the Appendix at AII-52-54. The trial court entered an order granting the Respondents' Motions for Summary Judgment as to the federal takings claim (Count II), which is set out in the Appendix at AI-5. The Petitioner filed a Motion for Rehearing on the trial court's order granting summary judgment, which Motion for Rehearing was denied. The Motion for Rehearing is set out in the Appendix at AI-72, and the Order denying rehearing is set out in the Appendix at AI-7. Additionally, the Petitioner filed a Memorandum of Plaintiff as to Issues to be Resolved at Rehearing citing to City of Monterey v. Del Monte Dunes at Monterey, Ltd., 119 S. Ct. 1624 (1999), which held that plaintiffs in takings cases are entitled to a jury trial. (AI-74.) This shows that the issue of a jury trial was addressed in the Motion for Rehearing. Moreover, the Petitioner's Memorandum opposing Respondents' Motions for Summary Judgment includes argument regarding a jury trial for Plaintiff's federal claims, citing Del Monte Dunes. (AII-19.) Additionally, the trial of the inverse condemnation claim in this case, which is the state's only post-deprivation remedy, was a bench trial, not a jury trial. The Petitioner appealed the trial court's grant of summary judgment to the Florida Fifth District Court of Appeal in Case No. 99-2355, and the issue of the inadequacy of the state remedy because Petitioner was not entitled to a jury trial in state court was raised in Petitioner's Initial Brief and Reply Brief in that appeal. (AII-54.) The 5th

DCA issued its P.C.A. of the trial court's dismissal on April 17, 2001. (AI-9.)

As to question presented number 6, regarding whether Florida's post-deprivation remedy of a state lawsuit for inverse condemnation is inadequate because a landowner is required to participate in a mitigation market as the remedy, this issue goes to whether or not Petitioner's Fifth Amendment taking claim against all Respondents was ripe. Petitioner's Fifth Amendment taking claim against all Respondents was presented as Count II of the Second Amended Complaint in the takings case (Case No. 96-14296-CA), which is set out in the Appendix at AII-2. The issue of the ripeness of Petitioner's Fifth Amendment takings claims was raised by all Respondents in their Motions for Summary Judgment, the relevant portions of which are quoted in the Appendix at AII-52-54. The trial court entered an order granting the Respondents' Motions for Summary Judgment as to the federal takings claim (Count II), which is set out in the Appendix at AI-5. The Petitioner filed a Motion for Rehearing on the trial court's order granting summary judgment, which Motion for Rehearing was denied. The Motion for Rehearing is set out in the Appendix at AI-72, and the Order denying rehearing is set out in the Appendix at AI-7. Additionally, the issue of the mitigation market being inadequate is raised in the Second Amended Complaint in the takings suit at Paragraphs 9 and 12. The issue of the adequacy of the mitigation market was also raised in Plaintiff's Memorandum in Opposition to Defendants' Motions for Summary Judgment, the relevant portions of which are quoted in the Appendix at AII-20. The issue of the adequacy of the mitigation market was also raised by the trial court in the final judgment on the inverse condemnation claim, which order is set out in the Appendix at AI-10. This ruling was appealed by Petitioner to the 5th DCA, and the adequacy of the mitigation market was raised in Petitioner's Initial Briefs, the relevant portions of which are quoted in the Appendix at AII-54 and AII-59. The 5th DCA issued its P.C.A. of the trial court's dismissal on April 17, 2001, set out in the Appendix at AI-9.

As to question presented number 7, which addresses the sufficiency of Petitioner's claim for Section 1983 conspiracy by all Respondents, the Section 1983 conspiracy claim was raised in the

Second Amended Complaint to the trial court. The sufficiency of Petitioner's 1983 conspiracy claim was raised in the trial court by the Petitioner in Plaintiff's Memorandum in Opposition to Defendants' Motions for Summary Judgment, which is included in the Appendix at AII-20. The trial court entered an order granting the Respondents' Motions for Summary Judgment as to the federal takings claim (Count II), which is set out in the Appendix at AI-5. The Petitioner filed a Motion for Rehearing on the trial court's order granting summary judgment, which Motion for Rehearing was denied. The Motion for Rehearing is set out in the Appendix at AI-72, and the Order denying rehearing is set out in the Appendix at AI-7. These rulings were appealed by Petitioner to the 5th DCA in Case No. 99-2355, and the sufficiency of the 1983 conspiracy claim was raised in Petitioner's Initial Brief, the relevant portions of which are quoted in the Appendix at AII-54. The 5th DCA issued its P.C.A. of the trial court's dismissal on April 17, 2001, set out in the Appendix at AI-9.

Statement of the Facts

In 1968 Atlantic Ridge Corporation subdivided a 12,500 acre ranch into 6,700 1.5 and 2 acre lots, spread out over 25 square miles in southern Brevard County, Florida. (R. 2797, 2779.) The subdivision, known as Cape Kennedy Estates (CKE), complied with all ordinances of Respondent Brevard County applicable at that time and the lots were registered for sale pursuant to the Florida Land Sales Act, Chapter 498 Fla. Stat., and the federal Interstate Land Sales Act. (R. 1356-57.) By early 1972, Atlantic Ridge had sold all 6,700 lots on an installment basis, but took back approximately 1,350 lots because of cancellation of installment sales. (R 2797). In 1981 Petitioner Farm & Grove Realty Company (F&G), acquired the 1,350 CKE lots from Atlantic Ridge, including Tract 184. (R. 1356, 2784-85.) Because these lots were available as sales that had been canceled by separate individual buyers, the lots were randomly scattered non-contiguously over the 25 square mile subdivision. (R. 2784.) Before F&G's purchase of the CKE Lots, F&G's licensed real estate broker/attorney examined each lot and determined each lot to be legally, ethically, and economically saleable and suitable as a homesite without undue regulation or burden by applicable federal, state, and county laws and

regulations. (R. 1356.) As the result of this determination, F&G's substantial investment in the property began in July, 1981, with a professionally created sales promotion of the CKE Lots. (R. 2784.) The sales program was successful, and F&G became the most active seller of lots in the CKE area. (R. 1357, 2784.) By October, 1994, (the time at which the actions complained of herein accrued) F&G had recorded in the public records of Brevard County over 600 lot sales totaling more than $7,600,000 in revenue. (R. 2784.)

At the time F&G purchased the lots from Atlantic Ridge, the County did not have any ordinance that required the building of roads in order to obtain a building permit. Rather, the County ordinance required that a property for which an owner sought a building permit was required to abut a dedicated road easement. Brevard County 80-50. All of the CKE Lots qualified. There was no requirement that the abutting road actually be built, and there were certainly no standards for how the roads were to be constructed. 80-50. Then, in 1991, the County adopted its first ordinance requiring that a road actually be built before a building permit would be issued. (Brevard County Ordinances; Exhibits to County's Requests for Admissions.) Simultaneously, the County enacted an ordinance that provided for a capital funding mechanism; i.e., a special tax district called a Municipal Service Benefit Unit (MSBU) to be set up to assist property owners in meeting the County's new road restrictions. MSBUs provided that the County issue bonds and build a road if the property owners on the road agreed to the building of the road. Once agreement was reached, the County built the road, and the cost was prorated by special improvement assessments spread over ten years, which were made on each landowner on the street to pay for the cost of the road. Thus, even under the County's new, more restrictive, road requirements in 1991, F&G's lots continued to sell because they still had some of their economic value as homesites. (Brevard County Ordinances) On October 18, 1994 the County removed the availability of the MSBU to the Cape Kennedy Estates area, including Tract 184, where no prior construction had occurred. (R. 1360.; Exhibit E to Complaint; AI-60.) Since 1991, when the County first required a road to be built before a building permit would be issued, this pro-rata mechanism for funding road construction had provided

the only economically feasible method for constructing the access required for owners of CKE lots to obtain building permits. (R. 2426-2428, 2418-2424.) Brevard County's land appraisers acknowledged in their respective appraisals that the MSBU was no longer available and that this unavailability destroyed the feasibility of the development of all of F&G's remaining lots. (R. 2426-2428.) Despite requests by F&G to bring the unpaved road ordinance into line with other infrastructure provisions affecting roads, water, and sewer extensions. The County refused to to enact any cost-sharing provision for the unpaved road Ordinance. (R. 1360 & Exhibit G to Complaint.) With no chance for reimbursement, the ordinance put 100% of the cost of the road -- a road that benefitted every property abutting the road -- on the applicant who then found the cost of building the road exceeded the finished value of the applicant's lot. (R. 4208.) This economic penalty effectively stopped sales of CKE lots, including Tract 184. (R. 2795, 2778.)

Meanwhile, in the early 1990's, the United States Fish & Wildlife Service (USF&W) gave notice to Brevard County that the County could be considered responsible for any unpermitted violations of the Act occurring within its boundaries that might endanger the threatened Scrub Jay or its habitat. (R. 1357, 2775, 2785, 2792; Peffer Depo. at 8.) In response, Respondent Brevard County created the "Scrub Jay Committee" to work with County staff and other scientists to examine the various options the County might have under the Endangered Species Act. (Barr Depo at 9; Peffer Depo at 8.) Respondent The Nature Conservancy (TNC) worked with the County's staff and the Scrub Jay Committee in creating this Mitigation Plan. (Barr Depo. at 36; Robinson Depo. at 22; Pescatello Depo. at 12.) Starting in December of 1992 until on or about July 26, 1995, the County-Wide Mitigation Plan was formalized as the Scrub Jay Conservation and Development Plan, "SCDP", (the Scrub Jay Plan). (R. 1388; Robinson Depo. at 10.) The SCDP scientifically designated critical "Core" areas where scrub jays nested. (Barr Depo. at 21,22.) 242 of F&G's lots (The Core Lots) are located within Core areas and are some of the subject properties of the claims in this case. (R. 1358.)

The SCDP expressly recognized that landowners in the Core areas, such as F&G, would not be allowed to apply for

variances, appeals, exceptions or other administrative remedy or relief from this designation. However, after the County's attorney warned the County Commission that they would have to pay fair market value for all of the property in the core areas, Brevard County rejected formal adoption of the Scrub Jay Plan. (Peffer Depo. at 17-19; Robinson Depo. at 13.) Instead, the County Commission directed the County's officials to implement the provisions of the Scrub Jay Plan by acquiring Core areas. (R. 1361; Robinson Depo. at 14; Peffer Depo. at 17-1.) However, the County's de facto adoption of the Scrub Jay Plan eliminated fair market value principles required by a government taking of property, and the County instructed its employees, as a policy set by the County Commission, to acquire the lands not only at less than fair market value but at the lowest possible cost. (Peffer Depo at 36.) The County employees were instructed to use various tactics to reduce the acquisition price of Core area land, including imposing regulatory measures to reach its goal. (Brevard County Memo, April 10, 1977; R. 2358.) The County invited proposals from various entities to become the County's acquisition agent to administer this program. (R. 1362.) In response to this request, TNC submitted its proposal, which extolled its expertise in purchasing lands at prices significantly below fair market value appraisals. (Exhibit I to Complaint) The motto and goal of TNC was "40¢ on the dollar" (R. 1367, 4204; Nations Depo. at 61-63.) The acquisition practices of the County were "to be meaner than a junk yard dog." (R. 2392.) In its application, TNC boasted of a previous land acquisition scheme where it purchased property in northern Brevard County known as the Enchanted Forest, which TNC then sold to the County. (Exhibit I to Complaint, R-2) TNC's application states that TNC refused to negotiate with the owner of the property, knowing that the property owner was in financial dire straits and waiting until the mortgagee foreclosed on the property, making a private arrangement with the mortgagee prior to the foreclosure sale and purchasing the property for $100 over the loan balance. (Exhibit I to Complain; Burns Depo. at 28 & 29.) TNC extolled its expertise in appraisal methods and in working with and training County personnel to conduct boundary mapping, surveys, environmental audits and appraisals. (Exhibit I to Complaint, Page 5, R-2.)

On Pearl Harbor Day, December 7, 1993, Brevard County approved TNC's application and hired TNC as an independent contractor for the job of acquiring property for the County at below fair market value (Employment Contract). (Exhibit K to Complaint.) TNC then hired Respondent Kevin Judd (Judd) that same month as its employee to work with the County in the performance of the Employment Contract. (Judd Depo. at 18.) The County and TNC, specifically trained Judd to follow methods to obtain property at less than fair market value. (Judd Depo. at 31 & 32.) Judd, on behalf of TNC and the County, implemented the plan of TNC and the County to obtain the land at below fair market value. (Wetlands Survey; Judd Depo.; Boundary Survey; R. 2437-39, 2448.) Judd's course of conduct was heartily endorsed and promoted by TNC and the County, and, in fact, was a central theme of reports of below market acquisitions contained in the quarterly self-evaluations submitted by TNC to the County and endorsed by Dr. Duane DeFreese, the County employee charged with coordinating the County's efforts with TNC. (R. 1364; Exhibits L-1 through L-7 to the Complaint; R. 2392.)

Judd's practice was to disregard the fair market value stated in appraisals; and, instead, to use the price of the lowest priced property used as a comparable property in the appraisals. (Judd Depo. at Page 31.) Judd also sent letters to landowners warning of "limited funds" and stating that it was a "one time only offer." (R. 2430.) In dealing with owners of larger parcels, Judd and TNC devised a method to exert last minute pressure by setting out a price high enough to be agreeable to the owner. (R. 2398 - 2402.) In one instance they even executed a written Letter of Intent. (R. 2398 - 2401.) Then, when plans and commitments had been made by the owner, the offer was reduced by 50%, (R. 2398-2401.), or even 60% (R. 1367), in spite of Judd and TNC's admitted duty to deal in good faith. (Nations Depo.) In another instance, the Appellees refused to pay for land that had been included in the contract because of an alleged title defect; however, even when the title defect was cleared, Appellees still failed to pay for the land included in the contract. (R. 2402.) The Respondents also used appraisals based on non-arms-length mitigation sales as comparable sales, and not based on the market's traditional per-lot method of valuation -- all in violation

of applicable standards. (Appraisal, Exhibit M to Complaint, Monograph, Exhibit H to Complaint; R. 2797, 2404; Appraisal, Exhibit M to Complaint.) Respondents also reduced the valuation of each lot 8-20% by subtracting the unused road easements, which was particularly inappropriate because Respondents knew that roads would not be built in a conservation area; thus the road easements would never be used and could not reduce the value of the property. (Judd Depo. at 67.; R. 4204.) Respondents also offered about one-tenth of their upland price for lots deemed to be "wetlands" in contravention of state law. (Judd Depo, Page 66; R. 2448, 1366.) F&G, struggling to survive and so that it could have some hope of selling these few lots, commenced building a small and finite number of unpaved roads without hope of cost-sharing from landowners who benefit from the new road abutting their properties. The County then imposed improper engineering and construction requirements to add time and cost to building the roads and to destroy the attractiveness of the lots. (R. 4207.) However, the unpaved road ordinance also restricted unpaved roads to no more than 1,320 feet from the nearest paved road. (Exhibit F to Complaint.) As all of the CKE lots in one of the core areas, the Valkaria Core, are substantially more than 1320 feet from the nearest paved road, this removed all of the Valkaria "Core" from its use. (R. 2778, 2795.)

Access to lots in sections 19, 20, 29, and 30 historically had been effected through a series of farm roads and canal maintenance roads. The County systematically closed or blocked these roads. Additionally, the County's application to the CARL program and TNC's application to the County spoke of controlled burns in the Core area. (Application Letter, Exhibit I to Complaint, R-2.) Also, the regulations for these controlled burns stated that they were allowed to be conducted right up to the edge of the property line with no setback requirement; thus, creating a higher risk of the spread of fire to neighboring lots. (Erik Tietig Affidavit; Exhibit to Plaintiff's Response to Motion for Summary Judgement.) With the recent history of homes in Florida burned by out-of-control forest fires, safety and habitability for humans was destroyed. (R. 2793.) Additionally, the County claimed the scrub jays were in danger from the Cooper's Hawk, which lived in tall trees (R. 4204); therefore, the

County logged all of its acquired Core area lands, removing the beautiful large oak and pine growth and turning the area into clear-cut desolation. (Exhibit I to Complaint, R-2.) This clear-cutting exacerbated the aversion of people to the Core areas for human habitation and destroyed purchase desirability. (R. 2776, 2793, 4204.) Throughout the time that Respondents were taking all of these actions, they released and encouraged more than 700 articles in one newspaper alone as well as other media stories, leaving no doubt that human use of these areas was incompatible with the Core nesting areas. (R. 2392, 2776, 2785, 2792-93.) The combination of physical barriers, improper appraisals, improper wetlands determination, improper area computation from the survey, destruction of access, clear-cutting of habitat, life-threatening and property-threatening burning practices, denial of road building laws and destruction of the private market resulted in the taking of 242 Core lots from F&G, the loss of F&G's ability to sell its remaining lots, and the destruction of F&G's business. (R. 2775, 2778, 2780, 2792-98.)

ARGUMENT

I. "VIABLE USEFULNESS AND ECONOMIC VALUE" DO NOT PRECLUDE EQUAL PROTECTION CLAIMS.

The 5th DCA's P.C.A. of the dismissal of Petitioner Farm & Grove Realty, Inc.'s, (F&G) Equal Protection claims, apparently on the ground that the property had "viable economic use and value," was a state court of last resort deciding an important federal question in a way that conflicts with the decisions of this Court and a United States court of appeals.[2] Whether the subject property retained some use and value is immaterial under Equal Protection analysis because, *inter alia*, "the establishment of a constitutionally protectible property interest is wholly irrelevant to an equal protection claim. . . . An

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[2] Although the grounds for the trial court's dismissal of F&G's Equal Protection claim were that the property had "viable economic use and value" and that "real doubt is cast upon whether Plaintiff's asserted Claim is 'ripe,'" it is appropriate to treat them as alternative bases of decision. See MacDonald, Sommer, & Frates v. Yolo County, 477 U.S. 340, 346 (1986) (stating that when a lower court does not rest its holding on only one of its two stated reasons, it is appropriate to treat the reasons as alternative bases of decision).

equal protection claim revolves around whether similarly situated persons are treated differently." The Reserve, Ltd., v. Town of Longboat Key, 17 F.3d 1374, 1381 (11th Cir. 1994) (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985)); Eide v. Sarasota County, 908 F.2d 716, 722 (11th Cir. 1990) (recognizing both facial and as-applied Equal Protection violations for landowners). Here, nevertheless, the Complaint alleges that no economic value exists for Tract 184 because the cost burden placed solely upon Plaintiff for the road exceeds its lot's value after installation, while 9 other lot owners bear nothing. The Complaint does not allege a mere reduction in value or a partial taking but alleges the complete taking of all economic value. Paragraph 16 (e) of the Complaint alleges a deprivation of: ". . . any reasonable and/or substantial economic use and/or value of the property." That pleading is a part of all seven counts in the Complaint, including the Equal Protection claim.[3] However, even if Tract 184 did retain some usefulness and/or economic value, such usefulness and economic value would not preclude consideration under an Equal Protection analysis; e.g., whether F&G was being subjected to an unduly burdensome impact without rational basis for such impact. Thus, because the lower courts wrongly decided the Equal Protection claim; i.e., on grounds of viable usefulness and economic value; their decisions conflict with established federal law regarding how Equal Protection claims must be decided, and the Court should grant certiorari to correct this error.

II. PETITIONER'S FACIAL AND AS-APPLIED EQUAL PROTECTION CHALLENGES ARE RIPE FOR ADJUDICATION.

The only grounds that might be ascribed to the trial court's dismissal of the Equal Protection claims were that the property had "viable economic use and value" and that "real doubt is cast upon whether Plaintiff's asserted Claim is ripe for

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[3]The standard of review is *de novo* regarding a dismissal for failure to state a claim, applying the same standard used by the district court, accepting the allegations set forth in the complaint as true for purposes of a motion to dismiss. See Kissimmee River Valley Sportsmen Ass'n v. City of Lakeland, 250 F.3d 1324, 1325 (11th Cir. 2001).

determination as a result of any dispositive action by Defendant."[4] The Court erred as a matter of law in dismissing F&G's facial and as-applied Equal Protection challenges to Brevard County's ordinances and resolutions on the basis of a lack of ripeness because the rulings of the Florida courts apparently have decided an important issue of federal law that ought to be decided by this Court; or, have decided an issue of federal law conflicting with rulings of this Court and with a United States Court of Appeals.

A. Ripeness is irrelevant to a facial Equal Protection challenge.

The lower courts erred as a matter of law in dismissing F&G's facial Equal Protection challenge to Brevard County's ordinances and resolutions on the basis of a lack of ripeness where the Complaint alleged that Brevard County has made a final decision and the County's action was arbitrary, capricious, and a thinly disguised method to create an unfair, illegal, and confiscatory tax or condition upon Petitioner's property which results in a permanent inordinate burden thereon.[5] Regarding ripeness in the context of inverse condemnation cases that are highly analogous to the instant case, this Court stated:

> [F]acial challenges to regulation are generally ripe the moment the challenged regulation or ordinance is passed, but face an "uphill battle," Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 495 (1987), since it is difficult to demonstrate that "'mere enactment'" of a piece of legislation "deprived [the owner] of economically viable use of [his] property." Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 297 (1981).

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 736, n.10 (1997); see also Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (holding that whether mere enactment of the statute amounted to a taking was a justiciable issue where the landowners who challenged zoning ordinances restricting the number of

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[4] See Footnote 1 regarding treating multiple reasons for dismissal as alternative bases of decision.

[5] See Footnote 3 regarding de novo standard of review.

houses they could build on their property sued without seeking approval for any particular development on their land). Thus, even if this Court chose to apply the ripeness analysis developed in the takings context to the Equal Protection context, the issue of ripeness is essentially inapplicable to a facial challenge.

However, it does not appear that this Court has expressly applied the same ripeness analysis used in takings cases to Equal Protection claims. For instance, this Court noted in Suitum that the lower court held that "[t]hese ripeness requirements, while developed in the regulatory taking context, 'are equally applicable to the due process and equal protection claims' 80 F.3d, [359,]362, n. 1. We address only the ripeness requirements for Suitum's takings claim, however, and express no opinion on the ripeness of her other claims." Id. at 733, n6. The Eleventh Circuit has held implicitly that a facial Equal Protection challenge has no ripeness requirement. See Southeast Florida Cable, Inc., v. Martin County, Florida, 173 F.3d 1332, 1338-39 (11th Cir. 1999) (holding that the terms of an FCC procedure do not require a final decision); Jackson v. Okaloosa County, Florida, 21 F.3d 1531, 1541 (11th Cir. 1994) (holding that ripeness is inapplicable because if the additional hurdle was interposed with discriminatory purpose and/or with disparate impact, then the additional hurdle itself is illegal whether or not it might have been surmounted).[6] Further-more, in stating its Equal Protection doctrine regarding land-use ordinances, the Eleventh Circuit extensively relied on Fry v. City of Hayward, 701 F. Supp. 179 (N.D. Cal. 1988). Eide, 908 F.2d at 716. The Fry Court held that a "final decision" on the application of a statute is not a prerequisite to a facial Equal Protection challenge. 701 F. Supp. at 181.

The Eide court also cited Pennell v. City of San Jose, 485 U.S. 1, 9-12 (1988), for the proposition that facial arbitrary and

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[6]The Jackson Court noted that in adjudicating Fair Housing Act claims, some courts have found it unnecessary for plaintiffs to exhaust local remedies, including zoning remedies, where an imminent injury exists. Id. at 1541, n16 (citing Huntington Branch, N.A.A.C.P. v. Town of Huntington, 689 F.2d 391, 393-94, n3 (2d Cir. 1982); Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208, 1214-16 (8th Cir.1972)).

capricious due process claims were considered on their merits while as-applied equal protection and due process claims were not ripe. 908 F.2d at 723. Here, the inapplicability of ripeness to facial challenges as cited above is consistently applicable to F&G's facial Equal Protection challenge because the Complaint alleged that Brevard County has made a final decision and the County's action was arbitrary, capricious, and a thinly disguised method to create an unfair, illegal, and confiscatory tax or condition upon Petitioner's property which results in a permanent inordinate burden thereon. The enactments, by themselves, mean that F&G's facial Equal Protection claim is sufficiently mature, and the issues are sufficiently defined and concrete, to permit effective decisionmaking by the court. Thus, F&G's facial challenge to Brevard County's resolution and ordinances should not have been dismissed on grounds of lack of ripeness. Therefore, this Court should grant certiorari to explicitly hold that facial Equal Protection challenges may not be dismissed for lack of ripeness.

B. F&G's as-applied Equal Protection claim was ripe for adjudication.

The trial court's order dismissing F&G's Equal Protection claim on grounds of ripeness conflicts with decisions of a federal Court of Appeals regarding ripeness. To establish ripeness of such an equal protection claim, the claimant must show only that the government has made a final decision adverse to the claimant's property rights. See Executive 100, Inc., v. Martin County, 922 F.2d 1536, 1541 (11th Cir. 1991) (citing Eide, 908 F.2d at 724 ,n12,725 n16). Moreover, Equal Protection claims that are based on allegations that the government's action had no rational basis, are not barred by the reapplication requirement stated in Mac-Donald, Sommers, & Frates, 477 U.S. at 340, even if reapplication were possible or relevant. Executive 100, 922 F.2d at 1541.

The reasoning behind requiring a final agency decision is because without such a decision, it would be impossible to determine what the final impact of the specific regulation is on a specific piece of property, and the court could not determine whether economic viability had been substantially destroyed. See Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 189 (1985). However, in this case, the damage to F&G's business has already occurred.

F&G has been unable to sell Tract 184 or any other of its lots in the area since Brevard County's regulatory actions culminated in the revoking of the MSBU Ordinance on October 18, 1994. The enactments of Brevard County's resolution and ordinances caused F&G sufficient injury to meet Article III's requirement of a case or controversy because F&G was forced to halt sale of Tract 184, as the land had lost all market value. That F&G has not applied for any permits is irrelevant to its Equal Protection claim. F&G's only business is selling real estate and Brevard County's actions have killed the market value of F&G's land because potential homebuilders will no longer buy land that would have a lower economic value after a road is constructed to make the land buildable than the cost of the road itself. F&G should not be required to change its business and become a developer or homebuildrer just to be able to challenge the Respondents' actions as a denial of Equal Protection. There is no additional action for F&G or Brevard County to take to prevent the Equal Protection violation because the business is already destroyed.

Nevertheless, the Complaint, at Paragraph 15, alleges that F&G did appeal to the County Commission to adopt a cost-sharing mechanism for the construction of unpaved roads, which the County declined to do. The October 17, 1995, refusal by the Brevard County Commission to amend the Unpaved Road Ordinance was the equivalent of a variance request and the final point of administrative exhaustion. As alleged in the Complaint, F&G had exhausted its administrative remedies and the matter was ripe for judicial review.

III. THE COUNTY'S ORDINANCES, FACIALLY AND AS APPLIED, DENY EQUAL PROTECTION BY ELIMINATING COST-SHARING MECHANISMS.

The 5th DCA P.C.A. of the dismissal of F&G's Equal Protection claim for failure to state a claim upon which relief could be granted, despite allegations of the unfairly cumulative burden caused by the enactment of new road requirements and the abolition of a viable mechanism for cost sharing and equitable contribution, was a state court of last resort deciding an important question of federal law that has not been, but should be, settled by this Court. Respondent Brevard County violated F&G's Equal Protection rights under the United States

Constitution because the County's actions in denying equitable contribution or similar cost-sharing mechanisms for ameliorating the disproportionately dire effects of the County's actions severely injured F&G and bears no rational relationship to legitimate governmental interests. "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (internal quotations and citation omitted). A regulation is invalid and will not be sustained if the classification drawn by the regulation is not rationally related to a legitimate state interest. See City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985). The Equal Protection clause does not deny to states the power to treat different classes of persons in different ways; it does, however, deny to states the power to legislate that different treatment be accorded to persons placed by statute into different classes on basis of criteria wholly unrelated to the object of that statute. See Eisenstadt v. Baird, 405 U.S. 438 (1972); see also Silva v. Vowell, 621 F.2d 640 (5th Cir. 1980) (holding that a state violates the Equal Protection clause when it irrationally treats differently those similarly situated or when it irrationally treats similarly those people situated differently). Here, F&G is a member of the class of property owners who are required to build a road to their property before obtaining a building permit, and who must bear the entire cost of such road construction. The road may be paved or unpaved; however, under the unpaved road ordinance, no MSBU or other similar cost-sharing mechanism is available under any circumstances to obtain equitable contribution from the adjoining property owners that would directly benefit from the road. Under the paved road ordinance, an MSBU is available only to members of the class of property owners who live less than 1320 feet from a county-maintained, paved road where housing does exist on the road easement; however, because Lot 184 is on a road easement where housing does not exist, no MSBU or similar cost-sharing mechanism is available to obtain equitable contribution from the adjoining property owners that would directly benefit from the road. Thus, the class to which F&G belongs is inordinately

burdened by the road ordinances requiring the class to bear the costs of road construction without any equitable contribution from adjacent landowners who thereby enjoy windfall benefits from F&G's bearing of the entire cost of the road construction.

Allowing the windfall; i.e., creating a disproportionate burden; is not rationally related to any legitimate governmental interest; and, if considered as an exaction, is not roughly proportional to such interests. See Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (holding in takings context that exactions must bear rough proportionality to government's interest. One analogous and time-honored precept of law requires that "special assessments should in no case exceed the benefits they confer to the property improved and that if the governmental entity imposes an assessment in excess of benefits, it will be held to the extent of the excess as the taking of property without due process of law. Stockman v. City of Trenton, 181 So. 383, 384 (1936). Historically, the cost of roads are assessed proportionately. The water and sewer extension policy followed by utilities in Florida and throughout the nation for over 50 years requires proportionality of burden; i.e., pro rata charging for benefits of infrastructure improvements; even when the initial cost is borne by the first user. For instance:

> Users 'who benefit especially . . . by the extension of the system . . . should bear the cost of that extension.' On the other hand, it is not 'just and equitable' . . . to impose the entire burden of capital expenditures . . . on persons connecting to a water and sewer system after an arbitrarily chosen time certain.
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> New users thus share with old users the cost of original facilities. For purposes of allocating the cost of replacing original facilities, it is arbitrary and irrational to distinguish between old and new users, all of whom bear the expense of the old plant and all of whom will use the new plant.

Contractors & Builders Ass'n of Pinellas County v. City of Dunedin, Fla., 329 So. 2d 314, 320-21 (Fla. 1976) (emphasis added, footnote omitted, citing extensively Hartman v. Aurora Sanitary Dist., 177 N.E.2d 214 (Ill. 1961)); cert. den., 444 U.S. 867 (1979). Here, the rational and equitable spreading of the

burden is denied to F&G by the ordinances. In enacting a new requirement that F&G and similar landowners construct a costly road to obtain a building permit; while, at the same time, effectively abolishing a legal mechanism that would have allowed F&G and similar landowners to assess owners of land adjoining the new road a pro rata share of the cost of the construction of the new road when the new road would also enable owners of land ad-joining the new road to obtain building permits; and, in not providing any other effective way of spreading the cost to those greatly and directly benefitting from the new road requirement, Respondent Brevard County violated F&G's right to Equal Protection. F&G's recourse to the cost-sharing mechanism was a vested right; and, even if Respondent Brevard County at one time did not have to provide the mechanism, Brevard County could not abolish the mechanism it provided without responsibility for the consequences when such consequences are so egregious and bear so little rational relationship to the County's legitimate interests. See Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (holding that the city had the burden to ensure rough proportionality in specific applications of its land-use regulations). When the County eliminated the MSBU and did not replace it with any other mechanism with which to fairly distribute the burden; e.g., main-tain economic value for the lots subject to the new road ordinan-ces; F&G's Equal Protection rights were violated and the County then had a duty to provide relief; e.g., pay for economic damages. In sum, eliminating equitable contribution while the newly oner-ous road ordinances are in effect and without providing any other ameliorating mechanism is too highly attenuated for any rational relationship to exist with a legitimate public purpose. Thus, F&G's Equal Protection claim was viable, both facially and as applied. Therefore, certiorari should be granted to determine whether dismissal of F&G's facial and as-applied Equal Protection claims should be reversed and remanded for trial on their merits.

IV. PRECLUSION OF PRIVATE DEFENDANTS AND JURY TRIAL, AND REQUIREMENT OF "MITIGATION MARKET" PARTICIPATION, ARE AN INADEQUATE POST-DEPRIVATION REMEDY.

The trial court's ruling, upheld by the Florida court of last resort, decided important federal questions that should be decided by this Court because the trial court entered summary judgment in favor of Respondents on the federal Fifth and Fourtheenth Amendment takings claims, while allowing the state law inverse condemnation claim to proceed. "Ordinarily, a plaintiff must seek compensation through state inverse condemnation proceedings before initiating a takings suit in federal court, unless the State does not provide adequate remedies for obtaining compensation." Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 734 (1997). Here, in the three subsections below, F&G discusses how F&G should have been allowed to try its federal takings claims without first undergoing the state law inverse condemnation procedure because Florida state court procedure for claiming inverse condemnation is an inadequate remedy: first, state law precludes F&G and others similarly situated from suing private entity state actors; i.e., Respondents Kevin Judd and The Nature Conservancy; for their role as state actors in effecting a taking of F&G's land; second, state law precludes F&G and others similarly situated from obtaining a trial by jury regarding whether the taking occurred; and, third, state law requires F&G to participate in a mitigation market to sell its property for less than fair market value in a market artificially created by Respondents in an effort to avoid paying fair market value.

A. The Florida inverse condemnation remedy is inadequate because F&G's state claim for inverse condemnation cannot be brought against a private entity acting in the role of state actor.

Under Florida inverse condemnation law, F&G's claim can be made only against specified public entities. See Florida Statute 74.011 (specifying those public entities that may exercise eminent domain). However, § 1983 provides that a private entity (here TNC and Judd), can be sued for taking without just compensation if the private entity is a state actor. In this case, The Nature Conservancy and Mr. Judd were under contract with Respondent Brevard County to acquire F&G's land for a legitimate -- even laudable -- public purpose; i.e., government preservation as a wildlife refuge. It is the ways and means by which all Respondents acted -- all acting under color of state law

-- in acquiring the land that resulted in the deprivation of F&G's Fifth Amendment rights. Thus, the Florida state procedures offer no remedy to F&G against TNC and Judd for the taking.

The exemption of private-entity state actors is especially important because TNC and Judd can be liable for exemplary and punitive damages as private parties, while the County cannot be required to pay such damages. Thus, the Florida state procedures are inadequate in this case because F&G is precluded from suing two defendants and is precluded from an entire category of potential damages.

This issue raises an important federal question in this era of privatization of traditional government functions. See Richardson v. McKnight, 521 U.S. 399 (1997) (discussing heightened need and ability to hold private-entity government contractors accountable for § 1983 violations). Here, a strong likelihood exists that The Nature Conservancy and Mr. Judd would have been found liable for a Fifth Amendment taking. Thus, because Florida law offers no remedy for The Nature Conservancy and Judd's taking of F&G's property, Florida's state remedies were inadequate, and this Court should grant certiorari to declare the remedy inadequate.

B. The Florida inverse condemnation remedy is inadequate because F&G's state claim for inverse condemnation cannot be tried before a jury.

The trial court's ruling, upheld by the State court of last resort, decided an important federal question that should be decided by this Court; i.e., F&G's Fifth Amendment takings claim should not have been dismissed because the State of Florida's preclusion of a trial by jury for an inverse condemnation claim is an inadequate remedy under law; and, therefore, F&G was not required to exhaust its state court remedy to bring its Fifth Amendment takings claim. In a state law claim in Florida for inverse condemnation, the question of whether a taking has occurred is decided by the court, not by the jury. See Department of Agriculture & Consumer Svcs. v. Bonanno, 568 So. 2d 24, 28 (Fla. 1990). However, in federal court, claims of violations of Fifth Amendment taking and other rights secured under 42 U.S.C. § 1983 are entitled to the Seventh Amendment guarantee of trial by jury. See City of Monterey v. Del Monte Dunes at Monterey, 526 U.S. 687, 708-11 (1999) (recognizing

that just compensation "is a purpose traditionally associated with legal relief"). Here, some or all of the disputed questions in the instant case were whether Respondents had denied a Fifth Amendment right in acting outside the bounds of their legitimate authority, a classic question for the jury. The right to a jury trial is a substantial right of citizens on so fundamental an issue as the deprivation of property, allowing a deprivation by the state without a jury trial undermines the adequacy of the state law takings remedy, and this Court should grant certiorari to declare the state remedy inadequate.

C. Florida's remedy is inadequate in forcing mitigation sales.

In essence, Respondents declared that "mitigation sales" were F&G's remedy for Respondents' actions that affected the value of F&G's property. Subsequently, pursuant to F&G litigating its inverse condemnation claim under Florida law, the trial court found and the 5th DCA affirmed that F&G's economically viable use of the property was not denied because "mitigation sales" of the land are possible. The affirmance of the mitigation market as a remedy for a taking by a Florida court of last resort means that this Court should decide whether such a remedy is inadequate for a taking, thereby allowing F&G to have brought a federal takings claim without exhausting the State of Florida court procedure.

The "mitigation market" purportedly is an exchange created by Brevard County that allows developers to purchase land in the Scrub Jay Refugia which will not be developed as a credit to offset or mitigate (and, ultimately, to facilitate) development of other environmentally sensitive areas in Brevard County. The market supply and demand (and, ergo, the price and economic value of land in the mitigation market) is controlled by Brevard County because the County specifies which land is eligible for mitigation sales and which land may be developed. This "remedy" of forcing F&G into the mitigation market raises an important question of federal law not previously addressed by this Court, although this Court has dealt to a limited extent with the somewhat analogous issue of Transferable Development Rights (TDR's) in Suitum, 520 U.S. at 725, and Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

Here, F&G averaged sales of 60 lots per year before the alleged taking occurred; and, immediately prior to the time of taking, F&G's lots had an average economic value in excess of $11,500 per lot; after the taking occurred, F&G could not sell any Core lots except a very few as mitigation sales for about $6,000.00 per lot. (TT 718:25-720:14.) Expert testimony was that, other than theoretically for mitigation sales, the lots in the core areas could not be sold, and the open market was dead; i.e., the lots had no economic value on the open market. (TT 701:5-14.) In fact, F&G's expert testified that F&G's situation was emblematic of a national concern for the "extinct market" phenomenon. (TT 703:21-705:23.)

F&G also adduced evidence that questioned whether the mitigation market actually exists or whether just a few mitigation sales were made as anomalous events. Nevertheless, if any mitigation market did exist, it would be artificially created by the same regulatory body (Brevard County) and driven by the same project (scrub jay preservation) that is seeking to conserve that property. In other words, even if this artificial market actually exists, the County created and controls the market through its scrub jay regulations and development permits. Respondents should not be allowed to use regulatory powers under color of state law to decrease the market value of the property so that Respondents can purchase the property for a lower amount and evade responsibility for a taking. See Joint Ventures, Inc., v. Department of Trans., 563 So. 2d 622, 625-26 (Fla. 1990) (citing cases from many other states to support the proposition that no valid distinction can be made between "freezing" property and deliberately attempting to depress land values in anticipation of eminent domain proceedings). Moreover, expert testimony stated that according to the Appraisal Institute, such mitigation sales are between hostage buyers and sellers and cannot be considered by land appraisers in establishing economic use. (TT 712:17-713:14.) The purported mitigation market is a way the County used its police powers to obtain the property at less than fair market value. Regarding a less controlled exchange program in a takings context, Justice Scalia (joined by Justice O'Connor) discussed at length the problems that arise with TDRs; e.g., whether there *is* a taking (causing the courts to say that the land retains substantial value, and has thus not been taken), rather than

on the question of whether the compensation for the taking is adequate, allowing the government to get away with paying much less. Suitum, 520 U.S. at 747-49 (Scalia, J., concurring). Here, Brevard County and the Florida courts "remedy" is to effectively channel F&G's land as inventory for the price-depressed mitigation market. Such a remedy is inadequate under the Fifth Amendment as a systematic way of evading payment of full and just compensation. This Court should grant certiorari to resolve this important question of takings law.

V. F&G ADDUCED SUFFICIENT EVIDENCE OF A § 1983 CONSPIRACY CLAIM TO SURVIVE SUMMARY JUDGMENT.

The affirmance of summary judgment against Petitioner F&G on F&G's § 1983 conspiracy count was a decision by a state court of last resort deciding an issue of federal law in conflict with decisions of this Court because F&G adduced substantial evidence that Respondents acted together under color of state law and pursuant to agreements between and among the Respondents to deny F&G rights protected by the United States Constitution and by federal law; e.g., the right to Equal Protection and the right to just compensation for the taking of property for public use. As a threshold matter, "the moving party [has] the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party." Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970) (citations omitted) (holding that the conspiracy claim should be tried because the defendant did not carry its burden because of its failure to foreclose the possibility that there was contact and an agreement between the government employee and the private entity). In deciding a Rule 56 motion for summary judgment, the movant must "show conclusively that a fact alleged by [the nonmovant] was not susceptible of an interpretation that might give rise to an inference of conspiracy." Id. at 160. Title 42 U.S.C. § 1983 provides a civil cause of action for violation of one's federally protected rights by a person acting under color of state law (a state actor). To prove a cause of action under § 1983, a plaintiff must show two elements: 1) a violation of the plaintiff's federally protected rights occurred, and 2) the violation was committed under color of state law. Willis v. University

Health Services, Inc., 993 F.2d 837, 840 (11th Cir. 1993). The Eleventh Circuit's predecessor stated:

> Of course, for a claim under § 1983, a conspiracy as such is not an indispensable element as it is under § 1985. But it may be charged as the legal mechanism through which to impose liability on each and all of the Defendants without regard to the person doing the particular act. [Footnote of citations omitted.] Conspiracy is asserted in that situation on more or less traditional principles of agency, partnership, joint venture, and the like.

Nesmith v. Alford, 318 F.2d 110, 126 (5th Cir. 1963), cert. denied, 375 U.S. 975 (remanding the 'conspiracy' aspect of the plaintiffs claims as to other actions violating Civil Rights for jury submission "unless the facts compel a direction one way or the other"). Here, as discussed in the subsections below, F&G adduced substantial evidence of material fact as to each of these elements.

A. Respondents Brevard County, TNC, and Judd were acting under color of state law.

Under the standard for summary judgment, F&G adduced sufficient evidence to maintain its claim of conspiracy under 42 U.S.C. § 1983 against Respondents Brevard County, TNC, and Judd. As this Court stated:

> [T]o act "under color of" state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting "under color" of law for purposes of § 1983 actions.

Dennis v. Sparks, 449 U.S. 24, 27-28 (1980) (citing Adickes, 398 U.S. at 152; and United States v. Price, 383 U.S. 787, 794 (1966)); accord Tower v. Glover, 467 U.S. 914, 919-20 (1984). This Court also stated:

> The involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized, or lawful; Monroe v. Pape, 365 U.S. 167 (1961); see United States v. Classic, 313

U.S. 299, 326 (1941); Screws v. United States, 325 U.S. 91, 107--111 (1945); Williams v. United States, 341 U.S. 97, 99--100 (1951).

Adickes, 398 U.S. at 152 (footnote omitted); Briscoe v. Lahue, 460 U.S. 325, 329-30 (1983) (noting that it is necessary to go beyond the "color of law" analysis to consider whether private witnesses may ever be held liable for damages under § 1983). Furthermore, a private entity is considered to be acting under color of state law if it meets any one of three criteria: 1) the private actor is performing a function that is traditionally a public function; 2) the actor is acting under state compulsion; or 3) the actor and the state have a nexus, or are acting jointly. National Broadcasting Co., Inc. v. Communications Workers of America, AFL-CIO, 860 F.2d 1022, 1026 (11th Cir. 1988); see also Harvey v. Harvey, 949 F.2d 1127, 1130 (11th Cir. 1992). "[P]rivate actors [have] aligned themselves so closely with either state action or state actors that the undertow pulls them inexorably into the grasp' of § 1983." Roche v. John Hancock Mut. Life Ins. Co., 81 F.3d 249, 253-54 (1st Cir. 1996). Also, the Eleventh Circuit stated that the trial court "wrongfully required a plaintiff to produce a 'smoking gun' when nothing more than an 'understanding' and 'willful participation' between private and state defendants is necessary to show the kind of joint action that will subject private parties to s 1983 liability." Bendiburg v. Dempsey, 909 F.2d 463, 469 (11th Cir. 1990).

In this case, TNC and Judd are state actors because they were executing a contractual agreement to acquire the real property of F&G and nearby landowners for wildlife preservation. "[S]tate employment is generally sufficient to render the defendant a state actor." West v. Atkins, 487 U.S. 42, 49 (1988) (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 936, n.6 (1982)). Thus, by the terms of their own contract, TNC and Judd worked under color of state law with the County to acquire property for the County for conservation purposes.

Moreover, TNC and Judd's role as acquisition agents for the County is a function traditionally reserved exclusively for the state. "The public function analysis is designed to flush out a State's attempt to evade its responsibilities by delegating them to private entities." Perkins v. Londonderry Basketball Club, 196 F.3d 13, 18-19 (1st Cir. 1999). If the Court accepts TNC and

Judd's arguments with respect to whether they were state actors, then the County will be able "to avoid its constitutional duties by a sham arrangement which attempts to disguise provision of public services as acts of private parties." Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (citing Evans v. Newton, 382 U.S. 296, (1966) (private trustees appointed to manage previously public park for white persons only))."To date, the short list of activities that have been held to satisfy this demanding criterion includes 'the administration of elections, the operation of a company town, eminent domain, peremptory challenges in jury selection, and, in at least limited circumstances, the operation of a municipal park.'" Perkins, 1999 WL 997787 at *4 (quoting United Auto Workers v. Gaston Festivals, Inc., 43 F.3d 902, 907 (4th Cir. 1995)) (citations omitted). The case law holds that eminent domain is a type of action reserved exclusively to the states, id.; see also Brentwood Academy v. Tennessee Secondary School Athletic Association, 180 F.3d 758, 763 (6th Cir. 1999), and the acquisition of scrub jay habitat is a function of park management. Thus, because F&G showed a material issue of fact as to whether or not TNC and Judd cooperated with the County in taking F&G's property (in the form of inverse condemnation, a type of eminent domain and park management), this conduct on the part of TNC and Judd is in furtherance of exclusively state functions, and TNC and Judd are state actors for purposes of § 1983.

B. Many issues of material fact exist to evince a conspiracy among and between Respondents.

F&G adduced substantial evidence of all of the necessary elements of its claims that Respondents violated F&G's right to just compensation for a taking and right to Equal Protection. A conspiracy under 42 U.S.C. § 1983 is an agreement between two or more individuals, where one individual acts in furtherance of the objective of the conspiracy, which causes an injury to a person or property, or deprives a person of exercising any right or privilege as a United States citizen. See Scott v. Dixon, 720 F.2d 1542, 1545 (11th Cir. 1983), cert. denied, 469 U.S. 832, 105 S.Ct. 122, 83 L.Ed.2d 64 (1984). Here, as a matter of law, sufficient evidence of F&G's takings claim is established by the fact that F&G's state law inverse condemnation claim survived summary judgment and went to a bench trial, even though the

state law claim does not provide a jury trial or other remedies as argued elsewhere in this Petition. Also, as argued elsewhere in this Petition, F&G alleged sufficient facts to state an Equal Protection claim against Brevard County to which the § 1983 Conspiracy claim against all Respondents attaches.

The evidence of Respondents' conspiracy shows: first, a conspiracy between the parties TNC, Judd, and Brevard County; a conspiracy to do an unlawful act or to do a lawful act by unlawful means, including to take property without just compensation, to deny state and federal due process, and to disregard statutory requirements for appraisals and land acquisition methods; the doing of the overt acts of entry into the Brevard County/TNC contract, implementation of the Scrub Jay Plan, erection of physical barriers, deliberate destruction of the residential market through clear-cutting and "controlled" burns, and attempts to coerce transfer of land ownership for substantially less than fair market value -- all in pursuance of the conspiracy; and fourth, damage to F&G, including loss of land's economic value, physical deprivation of the land, business damages, and attorney fees -- all as a result of Respondents' acts done under the conspiracy.

Specifically, F&G adduced substantial evidence that Defendants reached an understanding' to violate F&G's rights. Even if a § 1983 conspiracy claimant has no direct knowledge of an agreement between alleged co-conspirators, the sequence of events created a substantial enough possibility of a conspiracy to allow the conspiracy claim to proceed to trial, especially if the noncircumstantial evidence of the conspiracy could only come from adverse witnesses. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). Also, circumstantial evidence can raise an issue of motive regarding a conspiracy to deprive the claimant of federally protected rights. Id. Here, again, a contract was created between Brevard County and TNC that is an express written agreement of the understanding to implement the de facto restrictions of the Scrub Jay Plan; to use controlled burns, publicity, and other means to devalue the land and implement the Plan; to use illegal methods to assess the value of affected lands; and, to pay F&G and other similarly situated landowners less than fair market value for the lands that are thereby acquired; i.e., taken. Also, TNC was aware of the below market value policy of

the County (Pfeffer Deposition, Proffer of Evidence) and responded as early as their job-seeking Proposal of July 9, 1993 (Exhibit I to Complaint). It states in paragraph 3, Statement of Qualifications that TNC "negotiated... contracts ... 79.5% of the fair market value," that it was "experience in contracting for appropriate boundary mapping, surveys, environmental audits and appraisals" and that it "can assess the methodology employed by these professionals and its compliance with the standards required. . ." Furthermore, TNC and the County's actions in concert with each other to perform the contract and implement the Plan is also evidence of their understanding.

Regarding Judd, the evidence shows that Judd and his co-defendants reached an understanding to violate F&G's rights through the training of Judd to perform the Brevard County/TNC contract and his voluntary undertaking to do so. Specifically, Judd set the land prices and negotiated the acquisitions with landowners, telling them it was a "one-time only offer" and that funds were "limited." Then, Judd boasted of his success in acquiring the taken land for substantially less than fair market value.

Additionally, evidence is adduced to show that all Respondents possessed one or more peculiar power of coercion by virtue of their combination, which power an individual Respondent could not possess. Respondent Brevard County lacked the staff and expertise to implement the Plan and acquire the land; TNC could not implement the Plan or acquire the land without County contractual approval; and, both Brevard County and TNC needed an actual person; i.e., Judd; to perform the acquisition actions that Judd could not have performed without the County contract and TNC employment. Therefore, because the Florida court of last resort affirmed the summary judgment against F&G's § 1983 conspiracy claims in conflict with decisions of this Court, this Court should grant certiorari to consider remanding these claims for jury trial.

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(2) Supreme Court, U.S.
FILED
JUL 16 2001

No. 01 531

IN THE
Supreme Court of the United States

FARM & GROVE REALTY COMPANY,
Petitioner

v.

BREVARD COUNTY, FLORIDA,
THE NATURE CONSERVANCY,
and KEVIN JUDD,
Respondents.

On Petition for Writ of Certiorari
to the Fifth District Court of Appeals
for the State of Florida

APPENDIX VOLUME I TO PETITION FOR WRIT OF CERTIORARI

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76pp

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IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT IN AND
FOR BREVARD COUNTY, FLORIDA
CASE NO. 96-4509-CA-D

FARM & GROVE REALTY
COMPANY, A Florida corporation,
Plaintiff,

vs.

BREVARD COUNTY, FLORIDA,
a political subdivision
of the State of Florida,
Defendant.

_____/

ORDER

The Defendant's Motion to Dismiss the Complaint having come on for consideration before the undersigned Judge on July 10, 1996, and the Court having heard the arguments of counsel for the respective parties, having reviewed the record in this cause, including Defendant's extensive memorandum brief, and being otherwise fully advised, finds as follows:

1. The Court has jurisdiction over the subject matter and parties to this action.

2. The thrust of Plaintiff's allegations fail to establish a "taking" by the Defendant because Plaintiff's allegations in fact show its property has viable economic use and value in the face of the Defendant's subject ordinances and that in the present posture of the allegations real doubt is cast upon whether Plaintiff's asserted claim is "ripe" for determination as a result of any dispositive action by the

Defendant. Vatalaro v. Department of Environmental Regulation, 601 So. 2d 1223 (Fla. 5th DCA 192 [sic]) and City of Rivera Beach v. Shillingburg, 659 So. 2d 1174 (Fla. 4th DCA 1995).

The premises considered, it is

ORDERED and ADJUDGED as follows:

1. Defendant's said Motion to Dismiss is denied as to Count I of the Complaint for declaratory relief.

2. Defendant's said Motion to Dismiss is granted as to all of the rest and remainder of the Counts in the Complaint.

3. Leave is granted to the Plaintiff to Amend its Complaint within twenty days from the date of this Order. The Defendant has forty days from the date of this Order within which to answer or otherwise respond to Count I of the Complaint if the same is not Amended by the Plaintiff, and if the same is Amended by the Plaintiff the Defendant has twenty days from date of service of the Amended Complaint within which to answer or otherwise respond to same.

DONE and ORDERED in Chambers at Viera, Brevard County, Florida, this 15th day of July, 1996.

/s/_____
EDWARD M. JACKSON
CIRCUIT JUDGE

Copies furnished to:

Edward C. Tietig, Esquire
1326 Malabar Road, S.E.,
Suite 1
Palm Bay, Florida 32907

Eden Bentley, Esquire
Brevard Cty. Asst. Atty
2725 St. John's Street
Viera, Florida 32940

/s/_____
Judicial Assistant
Date: 7-16-96

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR
BREVARD COUNTY, FLORIDA
CASE NO. 96-4509 CA-D

FARM & GROVE REALTY COMPANY,
Plaintiff,

v.

BREVARD COUNTY, a political subdivision of the State of Florida,
Defendant.

_____/

AND CASE NO: 96-14296-CA-X

FARM & GROVE REALTY COMPANY,
Plaintiff,

v.

BREVARD COUNTY, a political subdivision of the State of Florida,
THE NATURE CONSERVANCY, a non-profit District of Columbia Corporation, as agent of Brevard County and individually; and
KEVIN JUDD, as agent of Brevard County and of The Nature Conservancy, and individually,
Defendants.

_____/

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

THIS CAUSE came on to be heard on April 12, 1999 on the Defendants The Nature Conservancy("TNC") and

Kevin Judd's ("Judd") Motion for Summary Final Judgment dated January 26, 1999, and the Defendant Brevard County's Amended Motion for Summary Judgment dated February 26, 1999, and the Court having heard argument of counsel, having reviewed the evidence on file with this court, the answers to interrogatories, depositions, request for admissions and pleadings, and all of the proferred evidence, the Court finds as follows:

1. As to Count I of Plaintiff's Second Amended Complaint, the Court finds that disputed issues of material fact remain.
2. As to Counts II and III, there are no disputed issues as to material fact, and the Defendants are entitled to judgment thereon as a matter of law.

BASED THEREON, IT IS ADJUDGED AS FOLLOWS:

1. As to Count I of Plaintiff's Second Amended Complaint, Summary Judgment is Denied.
2. As to Counts II and III of Plaintiff's Second Amended Complaint, Summary Judgment is Granted.
3. The Court reserves jurisdiction to consider entitlement to, and amount of, attorneys fees and costs.

DONE AND ORDERED in Chambers in Viera, Brevard County, Florida this 29th day of April, 1999.

/s/

W. DAVID DUGAN
Circuit Judge

cc:

Edward C. Tietig, Esquire
1326 Malabar Road, SE,
Suite 1
Palm Bay, FL 32907

Eden Bentley, Esquire
Ass't County Att'y
2725 Judge Fran Jamieson Way
Viera, Florida 32940

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT IN AND
FOR BREVARD COUNTY, FLORIDA
CASE NO. 96-04509-CA-D

FARM & GROVE REALTY COMPANY
Plaintiff;

v.

BREVARD COUNTY, a political subdivision of the State of Florida,
Defendant.

and

CASE NO. 96-14296-CA-

FARM & GROVE REALTY COMPANY
Plaintiff;

v.

BREVARD COUNTY, a political subdivision of the State of Florida, THE NATURE CONSERVANCY, a non-profit District of Columbia corporation, as agent of Brevard County and individually; and KEVIN JUDD,
Defendants.

ORDER ON PLAINTIFF'S MOTION FOR REHEARING AND REMAINING ISSUES RE: PLAINTIFF'S MOTION TO STRIKE SUPPORT OF DEFENDANT'S MOTION FOR

This cause having come before the Court on July 9, 1999, upon Plaintiff's Motion for Rehearing and the Court having heard argument of counsel and being fully advised of the premises, it is hereby

ORDERED and ADJUDGED that Plaintiff's prior *Ore Tenus* Motion to Strike Brevard County's Memorandum of Law in Support of Defendant's Motion for Summary

Judgment is DENIED. It is further

ORDERED and ADJUDGED that Plaintiff's Motion for rehearing is DENIED.

DONE and ORDERED in Chambers, at Viera, Florida, this 21st day of July, 1999.

/s/

W. DAVID DUGAN
Circuit Court Judge

I HEREBY CERTIFY that a conformed copy of the foregoing has been furnished to Edward C. Tietig, P.A., 1326 Malabar Rd S.E., Suite 1, Palm Bay, Florida, 32907, Kevin S. Hennessy, Esquire, Lewis, Longman & Walker, P.A., 1700 Palm Beach Lakes Blvd., Suite 1000, West Palm Beach, Florida, 33401, and Scott L. Knox, County Attorney, 2725 Judge Fran Jamieson Way, Viera, Florida, 32940, this 21st day of July, 1999.

/s/

Judicial Assistant

\pleadings\frm&grv\rehrg_ord.wpd

IN THE DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA FIFTH DISTRICT
JANUARY TERM 2001

FARM & GROVE REALTY COMPANY,
Appellant,

v.

CASE NO. 5D99-2355 &
5D00-649

BREVARD COUNTY, etc., et al.,
Appellees.

Decision filed April 17, 2001
Appeal from the Circuit Court
for Brevard County
W. David Dugan, Judge.
Lisa Kuhlman Tietig and Mark E. Tietig
of Tietig & Tietig, Merritt Island,
for Appellant.
Scott L. Knox, County Attorney,
Viera, for Appellee, Brevard County.
Kevin S. Hennessy and Eric B. Ash
of Lewis, Longman & Walker, P.A.,
West Palm Beach, for Appellees, The
Nature Conservancy and Kevin Judd.
PER CURIAM.

AFFIRMED.

SHARP, W., and PETERSON, JJ., and MONACO, D.,
Associate Judge, concur.

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT IN
AND FOR BREVARD COUNTY, FLORIDA
CASE NOS. 96-4509 CAD
96-14296 CAX

FARM & GROVE REALTY COMPANY,
Plaintiff,
v.
BREVARD COUNTY, a political
subdivision of the State of Florida,
Defendant,
and
FARM & GROVE REALTY COMPANY,
Plaintiff,
BREVARD COUNTY, et al.,
Defendants.
_____/

FINAL JUDGMENT

THIS CAUSE came on to be heard before the Court, without jury, and on the evidence presented, the Court finds as follows:

A. Based upon the evidence presented, the Court does not find that a physical taking has occurred.

B. As to Plaintiff's claim that a regulatory taking has occurred, the Court, likewise, finds that no regulatory taking has occurred. Plaintiff acquired the property in its present configuration without any reasonable expectation that the property could be feasibly developed. Plaintiff was fortunate to have sold many of the lots to buyers who purchased the property, even though the property was not contiguous, and without existing roads. The County did not, however, have

any obligation to build roads or provide a mechanism by which the roads could be constructed in an economically feasible manner. The real problem is that the Plaintiff purchased 1,320 lots, spread over a twenty-five (25) acre area, which lots are not contiguous. Therefore, to develop the parcels would require the Plaintiff to construct a road that would benefit not only Plaintiff's parcels but also parcels owned by other owners, without Provision for sharing the cost. This was a risk that Plaintiff took when it purchased the property, however, and was not created by the regulations of the Defendant. Defendant, Brevard County, had no duty to enact or continue to utilize the MSBU Ordinance, therefore. Furthermore, it is not the MSBU ordinance that imposes the purported burden on the Plaintiff. The unpaved road ordinance is what precludes development without first meeting the dictates of the ordinance. That ordinance, exhibit 31 for the Plaintiff, is a reasonable exercise of the police power and has not been applied in an arbitrary manner. Nor does it regulate to the point of an unconstitutional taking. Plaintiff has cited no authority for the proposition that the court can force the county to implement the MSBU method of infrastructure funding, and its lack of use does not give rise to a taking.

C. As to Plaintiff's contention that the characterization of the lands as scrub habitat somehow effected a taking, the Court fails to see how the Defendant, Brevard County, can be responsible for the impact of regulations related to endangered species. Moreover, on the evidence presented, even if the County were responsible, it is difficult to determine what impact, if any, the Endangered Species Act has on the subject parcels. No evidence was presented as to the existence of any scrub jays on any of the parcels, nor has Plaintiff ever applied for a permit to clear the subject parcels. Finally, even if the

County were responsible for the impact of the Endangered Species Act, the evidence does not support that a taking occurred in that the regulation does not deny substantially all economically beneficial or productive use of the land. Tampa-Hillsborough Expressway v. AGWS, 640 So.2d 54 (Fla. 1994)

D. As to the County's efforts to acquire these lands through the C.A.R.L. program, the Court does not find from the evidence that these efforts amount to a taking. See, Division of Administration. State of Florida. v. Frenchmen, 476 So.2d 224 (Fla. 4th DCA 1885); Farish v. South Florida Water Management District, 515 So.2d 365 (Fla. 4th DCA 1987).

E. The Court has carefully reviewed the cases cited by Plaintiff. In particular, the Court has reviewed Drake Bay Company v. The United States, 424 Fed.2d 574 (1970) and Althaus v. The United States, 7 Cl.Ct. 688 (1995), and finds these cases to be distinguishable from the facts presented at bar.

F. Although the court has sympathy for the Plaintiff's situation, under the prevailing authorities, the court does not believe the county is obligated to purchase Plaintiff's property under an inverse condemnation theory.

Based upon the foregoing, it is

ORDERED AND ADJUDGED that:

1. Plaintiff shall take nothing in this action and that Defendant shall go hence without day.

2. Jurisdiction is reserved for taxation of costs.

DONE AND ORDERED in Chambers, Titusville, Brevard County, Florida, this 14th day of February, 2000.

/s/

VINCENT G. TORPY, JR.
Circuit Court Judge

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV, sec. 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ORDINANCE NO. 80- 50

PROVIDING FOR THE ISSUANCE OF BUILDING PERMITS ON PRIVATE ROADS WITHIN THE UNINCORPORATED AREAS OF BREVARD COUNTY, FLORIDA; REPEALING PRESENT SECTION 61(a) AND SECTION 61(b) APPENDIX C-ZONING, BREVARD COUNTY CODE; CREATING SECTION 6-11, BREVARD COUNTY CODE; RELETTERING PRESENT SECTIONS 61(c), 61(d), 61(e), 61(f), 61(g), AND 61(h) TO APPENDIX C-ZONING, BREVARD COUNTY CODE; AND PROVIDING FOR AN EFFECTIVE DATE.

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF BREVARD COUNTY, FLORIDA, that:

Section 1. REPEALER

Section 61(a) and Section 61(b), Appendix C-Zoning, Brevard County Code, as those sections presently exist, are hereby repealed.

Section 2. CREATION OF NEW SECTION

Section 6—11 of the Brevard County Code is hereby created to read as follows:

Section. 6—11. Issuance of Building Permits.

(a) No building permit shall be issued for use on a parcel, unless (1) that parcel abuts on a street, road or easement dedicated to and accepted by the Board of County Commissioners of Brevard County, or (2) the owner of the parcel has a perpetual, irrevocable right of access to a street, road or easement dedidated to and accepted by the Board of County Commissioners of Brevard County, and complies with

the provisions of Subsection (b) of this Section, and the permit is for a single family dwelling and accessory structures thereto.

(b) Where a parcel does not abut on a street, road or easement dedicated to and accepted by the Board of County Commissioners of Brevard County, no building permit shall be issued until the following requirements are met in addition to any other requirements which may exist:

1. The private right of access from the parcel to a County street, road or easement must be evidenced by a legally sufficient instrument recorded in the Public Records of Brevard County granting such perpetual and irrevocable right of access. Said private access shall not include a street, road or easement dedicated to the public or the County by a plat or other recorded instrument.

2. The private access must be at least twenty feet (20') wide.

3. The private access route must be cleared and graded and maintained in such condition as will allow access by emergency vehicles.

4. The private access route must not prohibit public access to any dedicated and accepted County road right-of-way in the area.

5. Public officials in the performance of their duties, public utilities and emergency vehicles shall be granted use of said private access route at all times.

6. No more than two (2) building permits shall be issued to utilize a single private access route out to a street, road or easement dedicated to and accepted by the Board of County Commissioners of Brevard County without the authorization of the Board.

(c) The Board of County Commissioners may, in

its discretion, authorize the issuance of up to four (4) additional building permits to utilize a single private access route out to a street, road or easement dedicated to and accepted by the Board, provided that, in addition to the requirements of Subsections (b)1, (b)3, (b)4, and (b)5 of this Section 6-11, the private access route must be at least twenty-five feet (25') wide; the property must be platted in accordance with subdivision regulations of Brevard County; and each parcel for which a building permit is authorized must have an area of at least one-half (1/2) acre. In making such determination, the Board shall consider the following factors:

i) Whether the failure to issue a permit will work an undue hardship on a petitioner,

ii) The character and type of development in relation to the adjacent area,

iii) The geographic characteristics of the property.

(d) No building permits shall be issued pursuant to Subsections (a), (b), and (c) of this Section for a parcel or development plan that comes within the definition of subdivision contained in Brevard County Code, Appendix B-Subdivisions and Plats, unless, for a particular subdivision, the Board has waived the provisions of Brevard County Code, Appendix B- Subdivisions and Plats, relating to road design, construction and maintenance.

Section 3. RELETTERING OF PRESENT SECTIONS

Sections 61(c), 61(d), 61(e), 61(f), 61(g), and 61(h), Appendix C-Zoning, Brevard County Code, as those Sections presently exist, are hereby relettered as follows:

Section 61(c) of Appendix C to Section 6-11(e), Brevard County Code

Section 61(d) of Appendix C to Section 6-11(f), Brevard

County Code

Section 61(e) of Appendix C to Section 6-11(g), Brevard County Code

Section 61(f) of Appendix C to Section 6-11(h), Brevard County Code

Section 61(g) of Appendix C to Section 61, Appendix C-Zoning, Brevard County Code

Section 61(h) of Appendix C to Section 6-11(i), Brevard County Code

Section 4. RETITLING OF NEW SECTION 61

Section 61 is hereby retitled "FLAG LOTS".

Section 5. EFFECTIVE DATE

This Ordinance shall take effect pursuant to law.

DONE AND ORDAINED, in regular session, this 4th day of December, 1980.

BOARD OF COUNTY COMMISSIONERS
OF BREVARD COUNTY, FLORIDA.

By: /s/
Val M. Steele, Chairman

ATTEST:

/s/
R.C. Winstead, Jr., Clerk

(SEAL)

ORDINANCE 91-08

AN ORDINANCE OF BREVARD COUNTY, FLORIDA CREATING PROVISIONS FOR THE ISSUANCE OF BUILDING PERMITS ON PRIVATE ROADS, UNPAVED ROADS AND INGRESS/EGRESS EASEMENTS TO PUBLIC ROADS; AMENDING ARTICLE II OF CHAPTER 14, "ZONING AND BUILDING REGULATIONS" BY CREATING A NEW DIVISION 4 ENTITLED "ISSUANCE OF BUILDING PERMITS ON UNPAVED ROADWAYS AND ACCESS EASEMENTS"; PROVIDING FOR CONFLICTING PROVISIONS; PROVIDING FOR SEVERABILITY; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, Section 6-11 of the Brevard County Code requires that property abut a public street in order for a building permit to be issued on the subject property; and

WHEREAS, Section 6-11 provides an exception for parcels which do not abut on a public street if a parcel meets the criteria set forth for private roads or ingress/egress easements; and

WHEREAS, Brevard County wishes to expand the criteria for the use of unpaved roads for building permit purposes in rural residential areas; and

WHEREAS, Brevard County also wishes to place limitations on the use of unpaved roads to allow limited growth in the rural areas while preventing urban sprawl.

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF BREVARD COUNTY, FLORIDA, as follows:

SECTION 1. Chapter 14, Article II, Brevard County

Code, is hereby amended to establish a new Division 4, entitled "Issuance of. Building Permits on Unpaved Roadways and Access Easements" which reads as follows:

CHAPTER 14. LAND DEVELOPMENT REGULATIONS

ARTICLE II. ZONING AND BUILDING REGULATIONS

Division 4. Issuance of Building Permits an Private Roads, Unpaved Roadways and Access Easements

(A) Definitions.

For the purposes of this section, the following definitions shall apply:

(1) Access: An easement or other perpetual and irrevocable right of ingress or egress, which has been recorded in the public records of Brevard County, Florida.

(2) Flag lot: Any lot, plot, tract or parcel of land having a narrow, deeded, strip of land connecting the main body of said lot, plot, tract or parcel to a dedicated and accepted road, as defined in the Brevard County Zoning Regulations.

(3) Private road: A road, street or right-of-way utilized by the abutting properties only, which road, street, or right-of-way is not dedicated, accepted, or maintained by Brevard County.

(4) Public street: Any street, road, or easement dedicated to and accepted by the Board of County Commissioners of Brevard County, Florida, built to the specifications for paved or unpaved roads adopted by Brevard County, Florida, and maintained by Brevard County.

(5) Single-family residence: A private residence building used or intended to be used as a home or residence in which the use and management of all sleeping quarters, all appliances for sanitation, cooking, ventilation, heating and lighting are designed primarily for the use of one family unit.

(6) Unpaved Road: Any road stabilized to a Limerock

Bearing ratio of 40 (LBR 40) and constructed in an existing public right of way.

(B) Criteria for Issuance of Building Permits.

(1) Except as specifically provided in this section, no building permits shall be issued by Brevard County for use on a parcel, unless that parcel abuts on a public street, as defined herein.

(2) Exceptions: For parcels which do not abut on a public street, building permits may be issued for said parcels, in the following circumstances:

(a) Private Roads: Building permits for single-family residential structures, and appurtenant structures, may be issued for parcels utilizing private roads within recorded subdivisions, where such private roads connect directly to a public street, and where said private road is shown on a subdivision platted and recorded in the public records of Brevard County, Florida, and if, in the opinion of the Board of County Commissioners of Brevard County, Florida, the private road meets the following requirements:

1. That the private road must be constructed to those design specifications set forth in the Brevard County Subdivision Regulations and maintained by the applicant or homeowner's association; and

2. That the private road shall not restrict public access to any Brevard County right-of-way, or preclude or obstruct any existing or planned public road or street systems; and

3. Public utilities and emergency vehicles shall be granted the use of the private road, and, under no circumstances, shall such use be restricted; and

4. The private road shall not include a street, road, right-of-way, or easement dedicated to Brevard County or "the

public."

(b) Access by Easement: Building permits for single-family residential structures, and appurtenant structures, may be issued for parcels which do not abut on a public street, when it can.be shown that the parcel has access to a public street through a perpetual and irrevocable right of access, and such access shall not include a street, road, right-of-way or easement dedicated to Brevard County or "the public" by a plat or other recorded instrument; provided, however, that the following criteria have been met:

1. That the parcel is of unique dimension or character, such that direct access by abutting on a public street is not feasible; and

2. That the parcel cannot be established as a flag lot, pursuant to the provisions of the Brevard County Zoning Regulations; and

3. That the access is at least twenty (20) feet wide; and

4. That the access is cleared, graded and maintained so as to assure access by emergency vehicles; and

5. That the access is not within a flag lot access strip, except where said flag lot is five (5) acres or more in size; and

6. That the access is for the exclusive use of the parcel for which the building permit is to be issued; and

7. That the access is not within ninety (90) feet of the nearest private access utilized for building permit purposes under this section.

(c) Unpaved Road Agreements: The Board of County Commissioners and the property owners whose property abuts a right-of-way which is not maintained by the County may enter into an agreement to allow the issuance of a single family

residence structure building permits under the following conditions:

1. These agreements shall be limited to existing County rights-of-way.

2. Only those properties within one-quarter mile of a County maintained roadway are eligible.

3. Individual lots, parcels or tracts of land must have a minimum area of 0.9 acre to be eligible to enter into an unpaved road agreement with the County.

4. Each lot, parcel or tract of land must meet all of the requirements of the Comprehensive Plan, shall satisfy all criteria of the Consumer Health Division and shall meet all the requirements of the Office of Natural Resources prior to issuance of a building permit.

5. There shall be a limitation of one agreement per property owner which is not transferable, and shall have a time limitation of one year.

6. By entering into the agreement, the property owner is responsible for all costs related to the roadway including survey, design, engineering, permitting, and construction. The roadway would be designed and stabilized to a minimum of LBR40 and would be reviewed and inspected by the County Engineer or his designee, for approval prior to the issuance of a building permit. Additionally, to defer the cost of County maintenance, the agreement shall stipulate a fixed amount that must be paid prior to execution of the agreement. This amount would be determined by the Transportation Department and adopted by Resolution in an amount necessary to reimburse Brevard County for maintenance costs.

7. Upon entering into the agreement, the property owner shall also agree that once more than fifty percent (50%)

of the buildable lots have been issued building permits, the property owner will participate in a Municipal Service Benefit Unit (MSBU) for paving of the road.

8. Where the subject roadway on which the agreement applies intersects with an existing County maintained dirt road, and where all buildable lots abutting the subject roadway are 2.5 acres or larger in area, the property owner would not be required to participate in the establishment of a Municipal Service Benefit Unit (MSBU) for paving of the street.

(C) Application procedure.

Any person seeking the issuance of a building permit, under the provisions of this section, shall submit an application with the Brevard County Development Review Department, on such form as provided by the Brevard County Development Review Department, together with such application fee as may be adopted by resolution by the Board of County Commissioners of Brevard County, Florida. Said application shall be in addition to, and submitted in conjunction with an application for building permit, submitted to the Brevard County building official, under the provisions of Chapter 6, Code of Brevard County, Florida. Said application shall include, at a minimum, the following:

(1) A copy of the deed or instrument indicating current ownership of the parcel; and

(2) A copy of the deed' or instrument indicating applicant's interest in the subject parcel; and

(3) A copy of the Brevard County property appraiser's map of the subject parcel, indicating all properties within five hundred (500) feet of the subject parcel.

(D) Review.

Any applicant who is aggrieved by any decision by the Director

of the Brevard County Development Review Department, that the subject parcel does not comply with the criteria set forth in this section, may, within thirty (30) days after the date of the decision of the Development Review Department Director, or his designee, apply to the Board of County Commissioners of Brevard County, Florida, for review of the Director's decision.

SECTION 2. Conflicting Provisions. In the case of direct conflicts between any provision of this ordinance and a portion or provision of any other appropriate federal, state or county law, rule code or regulatio.n, the more restrictive shall apply.

SECTION 3. Severability. If any provision of this ordinance or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this ordinance are declared severable.

SECTION 4. Effective Date. This ordinance shall take effect pursuant to general law.

DONE, ORDERED AND ADOPTED in Special Session, this 26th day of June, 1991.

BOARD OF COUNTY COMMISSIONERS
OF BREVARD COUNTY, FLORIDA

/s/_____

By: Sue Schmitt, Chairman

ATTEST:

/s/_____

R.C. Winstead, Jr., Clerk

(SEAL)

ORDINANCE NO.91- 12

AN ORDINANCE OF BREVARD COUNTY, FLORIDA AMENDING CHAPTER 21, "TAXATION", BREVARD COUNTY CODE OF LAWS AND ORDINANCES; SPECIFICALLY ESTABLISHING A NEW ARTICLE ENTITLED "MUNICIPAL SERVICE BENEFIT UNITS; PROVIDING FOR DEFINITIONS; PROVIDING FOR ESTABLISHMENT OF BENEFIT UNITS AND COLLECTION OF ASSESSMENTS; PROVIDING FOR POWERS AND DUTIES RELATING TO THE ACQUISITION AND CONSTRUCTION OF PROJECTS, FINANCING AND ISSUANCE OF BONDS; PROVIDING FOR THE METHOD OF ESTABLISHING ASSESSMENTS; PROVIDING FOR THE METHOD OF COLLECTION OF ASSESSMENTS; PROVIDING FOR THE ISSUANCE OF BONDS PROVIDING FOR SEVERABILITY; PROVIDING FOR AN ALTERNATIVE METHOD; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, pursuant to Article VIII, Section 1 of the Florida Constitution, and Sections 125.01 and 125.66, Florida Statutes, the Board has all powers of local self-government to perform county functions and to render services in a manner not inconsistent with general law and such power may be exercised by the enactment of county ordinances; and

WHEREAS, Section 125.01(1)(q), Florida Statutes, provides specific legislative authorization to establish a municipal service benefit unit for any part or all of the unincorporated areas within its boundaries within which may be provided streets, sidewalks, street lighting, drainage, potable water, sanitary sewer and other essential facilities and

improvements; and

WHEREAS, the purpose of this Ordinance is to (i) provide procedures and standards for the imposition of certain Assessments within municipal service benefit units established by the County, for capital projects to be located within existing government or utility controlled rights of ways and easements, and (ii) authorize the issuance of Bonds secured by the subject Assessments to finance the cost of projects within the Benefit Units.

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF BREVARD COUNTY, FLORIDA:

SECTION 1. Chapter 21, Article IV, Code of Brevard County, Florida, is hereby established as follows:

CHAPTER 21. TAXATION.

ARTICLE IV. MUNICIPAL SERVICE BENEFIT UNITS

SECTION 21-40. DEFINITIONS.

As used in this Ordinance, the following words and terms shall have the following meanings, unless the context clearly otherwise requires. The terms "herein," "hereunder," hereby," "hereto," "hereof," and any similar terms, shall refer to this Ordinance; the term "heretofore," shall mean before the date of adoption of this Ordinance; and the term "hereafter" shall mean after the date of adoption of this Ordinance.

Words importing the masculine gender include every other gender.

Words importing the singular number include the plural number, and vice versa.

(1) **"Assessment"** means a non-ad valorem assessment lawfully imposed by the County for the payment of

costs in accordance with the terms of this Ordinance against properties specially benefited [sic] by an individual Project or several Projects.

(2) **"Assessment Coordinator"** means the person designated by the Board to be responsible for coordinating Assessments within a Benefit Unit or such person's designee.

(3) **"Assessment Roll"** means a non-ad valorem assessment roll relating to an Assessment, approved by a Final Assessment Resolution as required by Section 21-43(7) hereof.

(4) **"Board"** means the Board of County Commissioners of Brevard County, Florida.

(5) **"Bonds"** means the bonds or other obligations issued or incurred by the County pursuant to Section 21-45 hereof, payable from the pledged revenues.

(6) **"Clerk"** means the Clerk of the Circuit Court of Brevard County, ex-officio Clerk of the Board, or any Deputy Clerk.

(7) **"Cost"** means, as applied to any Project, (a) the cost of physical construction, reconstruction or completion, (b) the costs of acquisition or purchase, (c) the cost of all labor, materials, machinery and equipment, (d) the cost of all lands and interest therein, property rights, easements and franchises of any nature whatsoever, (e) the cost of any indemnity or surety bonds and premiums for insurance during construction, (f) interest prior to and during construction, for such period of time after completion of the construction or acquisition of such Project as the Board deems appropriate, and for such period of time after the issuance of the Bonds and Notes as may be necessary to collect the initial annual installment of Assessments, (g) amounts necessary to pay redemption premiums or other costs associated with the early retirement of Bonds and Notes related to the Project, (h) the creation of

reserve or debt service funds, (i) costs and expenses related to the issuance of Bonds and Notes related to the Project, all financing charges and any expenses related to any liquidity facility or credit facility, including interest on Bonds and Notes held by the issuer of such liquidity facility or credit facility, (j) the cost of construction plans and specifications, surveys and estimates of costs, (k) the cost of engineering, financial, legal and other consultant services associated with the Project, (1) the cost of engineering, financial, legal and other consultant services and any other cost associated with the structure, implementation and collection of Assessments, including any service charges of the Clerk, Tax Collector or Property Appraiser and amounts necessary to off-set discounts received for early payment of Assessments pursuant to applicable law, and (m) all other costs and expenses properly attributable to such acquisition or construction, and such other expenses as may be necessary or incidental to any financing authorized by this Ordinance, including a reasonable contingency amount; and including reimbursement of the County or any other person, firm or corporation for any moneys advanced for any costs incurred by the County or such person, firm or corporation in connection with any of the foregoing items of cost.

(8) **"County"** means Brevard County, Florida.

(9) **"Final Assessment Resolution"** means the resolution described in Section 21-43(7) hereof which shall confirm or deny the Initial Assessment Resolution and which shall be the final proceeding for the imposition of an Assessment.

(10) **"Benefit Unit"** means a municipal service benefit unit established by Section 21-41 hereof and any other municipal service benefit unit subsequently established by

Ordinance of the County incorporating the terms and provisions hereof by reference.

(11) **"Initial Assessment Resolution"** means the resolution described in Section 21-43(2) hereof which shall be the initial proceeding for the imposition of Assessments.

(12) **"Notes"** means (a) the proceeds of the Bonds, including investment earnings, (b) proceeds of the Assessments, as specified by the resolution authorizing the Bonds, and any other non-ad valorem revenues or other legally available moneys specifically pledged by the County under the resolution authorizing the Bonds.

(13) **"Pledged Revenues"** means (a) proceeds of the Assessments, as including investment earnings, (b) proceeds of the Assessments, as specified by the resolution authorizing the Bonds, and any other non-ad valorem revenues or other legally available moneys specifically pledged by the County under the resolution authorizing the Bonds.

(14) **"Project"** means road, drainage, water, sewer and canal dredging and maintenance, or other capital improvements located within existing government or utility controlled rights of ways or easements within the Benefit Unit.

(15) **"Project Appraiser"** means the Property Appraiser of the County.

(16) **"Tax Collector"** means the Tax Collector of the County.

(17) **"Tax Rolls"** means the real property ad valorem tax assessment roll maintained by the Property Appraiser of the County for the purpose of the levy and collection of ad valorem taxes.

SECTION 21-41. ESTABLISHMENT OF MUNICIPAL SERVICE BENEFIT UNITS.

(1) APPLICATION TO BENEFIT UNITS.

Municipal service benefit units may be brought within the scope of this Ordinance by specifically referencing and incorporating the terms of this Ordinance in the ordinance creating such municipal service benefit unit.

(2) CHANGES IN BENEFIT UNIT BOUNDARIES. Nothing in this Ordinance shall be construed to prohibit the adoption of a future ordinance changing the boundaries of any Benefit Unit. The expansion or contraction of any Benefit Unit shall not invalidate any Assessment properly imposed hereunder; provided however, that the Board shall comply with the procedures set forth herein prior to imposing any Assessment against property not previously subject thereto.

SECTION 21-42. POWERS AND DUTIES.

(1) PROJECTS. The Board shall have the following authority and powers within the benefit units with respect to the acquisition and construction of Projects:

(a) to acquire, improve and construct Projects;

(b) to acquire in the name of the County, either by purchase or the exercise of the right of eminent domain by the County, such lands and rights and interests and to acquire such personal property as may be deemed necessary in connection with the acquisition and construction of the Projects;

(c) to make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this Ordinance, and to employ such consulting engineers, attorneys, accountants, construction and financial experts, superintendents, managers and other employees, contractors and agents as may, in the judgment of the Board, be deemed necessary or convenient and to fix their compensation;

(d) to pay out of any funds that may be available

for that purpose such portion of the costs associated with any Project as it may deem proper; and

(e) to exercise any and all of the powers of the County not enumerated above necessary or incidental for the purpose of providing the services, improvements and benefits described herein.

(2) ASSESSMENTS AND BONDS. The Board shall have the following authority and powers within the Benefit Units with respect to financing the costs of the Projects:

(a) to impose and collect Assessments in the manner provided herein;

(b) to authorize and issue Bonds payable from Pledged Revenues to finance the cost of the Projects in the manner provided in this Ordinance;

(c) to authorize and issue Notes to finance the cost of the Project payable from the moneys described in Section 21-45(5) hereof; and

(d) to exercise any and all of the powers of the County not enumerated above necessary or incidental for the purpose of providing the services, improvements and benefits described herein.

SECTION 21-43. ASSESSMENTS.

(1) GENERAL AUTHORITY. The Board may provide for the cost of an individual Project or several Projects through imposition, in the Benefit Unit in which such Projects are located, of Assessments upon benefited [sic] property within the Benefit Unit at a rate of assessment based on the special benefit accruing to such property from such Project or Projects. Assessments shall be assessed in conformity with the procedures set forth in this Article IV. The computation of Assessments may be made on the basis of a general

methodology designed to provide the maximum achievable equity among properties within each Benefit Unit, which methodology shall be applied uniformly against all similar properties. Nothing contained in this Ordinance shall be construed to require the imposition of Assessments against property in public ownership.

(2) INITIAL PROCEEDINGS. The initial proceeding for imposition of an Assessment shall be the passage by the Board of an Initial Assessment Resolution ordering the acquisition, construction or reconstruction of assessable improvements constituting an individual Project or several Projects, indicating in general, the location (the location may be established by reference to boundaries or a map or by reference to the Benefit Unit) and description of such improvements, which shall be sufficient to enable the Assessment Coordinator to prepare or cause preparation of the preliminary plans and specifications of such improvements as described in subsection (3) hereof. The Initial Assessment Resolution may also state the portion, if any, of the Project to be paid by the County and shall state the estimated costs of the Project, if available, and the method of assessment which may be by frontage, acreage, square footage, parcel or any other combination thereof or any other method deemed equitable by the Board. The improvements constituting the Project or Projects need not be contiguous and may be in more than one locality or street. The Initial Assessment Resolution ordering any such improvement may give any short and convenient designation to each improvement ordered thereby. Notice of the Board's intent to impose the Assessments shall be recorded in the Official Records Book in the office of the Clerk. Such notice shall provide in general the locations of the property which are assessed and direct interested parties to the Initial Assessment

Resolution.

(3) PLANS AND SPECIFICATIONS. For any Project that has not yet been constructed, the Assessment Coordinator shall, as soon as possible after the passage of the Initial Assessment Resolution, prepare or cause preparation of, preliminary plans, specifications and cost estimates for the improvements constituting the Project. The plans and specifications need only be in sufficient form to enable the Assessment Coordinator to estimate or cause estimation of the costs of the Project and prepare the Assessment Roll.

(4) ASSESSMENT ROLL. The Assessment Coordinator shall also prepare or cause preparation of the Assessment Roll, which shall contain the following:

(a) A summary description of lots and parcels of land or land within the Benefit Unit (conforming to the description contained on the Tax Roll) which will benefit from such assessable improvements constituting the Project or Projects and the amount of such benefits to each such lot or parcel of land.

(b) The name of the owner of record of each lot or parcel as shown on the Tax Rolls.

(c) The total cost of the improvements to be assessed against each benefited [sic] lot or parcel.

Such plans, specification, cost estimates and the Assessment Roll shall be provided to the Clerk and retained by the Assessment Coordinator and shall be open to public inspection. The foregoing shall not be construed to require that the Assessment Roll be in printed form if the amount of the Assessment for each parcel of property can be determined by use of a computer terminal available at each location.

(5) NOTICE BY PUBLICATION. The Assessment Coordinator, upon the filing of such plans,

specifications, cost estimates and Assessment Roll, shall publish once in a newspaper of general circulation, published and circulating in the County, a notice stating that at a meeting of the Board on a certain day and hour, not earlier that [sic] 20 calendar days from such publication, which meeting shall be a regular, adjourned or special meeting, the Board will hear objections of all interested persons to the Final Assessment Resolution which shall approve the aforementioned plans, specifications, cost estimates and the Assessment Roll. If the Assessments are to be collected in the same bill as ad valorem taxes, the published notice shall conform to the requirements set forth in Sections 197.3632 and 197.3635, Florida Statutes, or any successor statutes authorizing the collection of non-ad valorem assessments on the same bill as ad valorem taxes. Such notice shall include (a) a geographic depiction of the property subject to the Assessment, (b) a brief and general description of the applicable Project with the location thereof (location may be established by reference to boundaries or a map or by reference to the Benefit Unit), (c) the procedure for objecting provided in subsection (6) hereof, and (d) a statement that plans, specification, cost estimates and the Assessment Roll, which shall include the method or methods of assessment, are available for inspection at the offices of the Clerk and the Assessment Coordinator and all interested persons may ascertain the amount to be assessed against a lot or parcel of property at the offices of the Clerk and the Assessment Coordinator.

(6) NOTICE BY MAIL. In addition to the published notice required by subsection (5), the Assessment Coordinator shall provide notice by first class mail to each property owner proposed to be assessed. If the Assessments are to be collected on the same bill as ad valorem taxes, the mailed

notice shall conform to the requirements set forth in Sections 197.3632 and 197.3635, Florida Statutes, or any successor statutes authorizing the collection of non-ad valorem assessments on the same bill as ad valorem taxes. Notice shall be mailed at least 20 calendar days prior to the hearing to each property owner at such address as is shown on the Tax Rolls. Notice shall be deemed mailed upon delivery thereof to the possession the U. S. Postal Service. The Assessment Coordinator may provide proof of such notice by affidavit.

(7) ADOPTION OF FINAL ASSESSMENT RESOLUTION. At the time named in such notice, or to which an adjournment or continuance may be taken by the Board, the Board shall receive any written objections of interested person and may then or at any subsequent meeting of the Board adopt the Final Assessment Resolution which shall (a) approve the aforementioned plans, specifications and cost estimates, with such amendments as it deems just and right; (b) repeal or confirm the Initial Assessment Resolution with such amendments, if any, as may be deemed appropriate by the Board; (c) approve the Assessment Roll, including the method of assessment, with such amendments as it deems just and right; and (d) establish the interest rate or the method of determining the rate of interest which the Assessments shall bear, including the date from which such interest shall accrue, and the terms of prepayment, if any. Assessments shall be levied against all property in the applicable Benefit Unit specially benefited [sic] by the Project or Projects. The Board shall not approve any Assessment in excess of the special benefits to the property assessed, and the Assessments so approved shall be in proportion to the special benefits. All objections to the Final Assessment Resolution shall be made in writing, and filed with the Clerk at or before the time or

adjourned time of such hearing.

(8) EFFECT OF FINAL ASSESSMENT RESOLUTION. Assessments shall be established upon adoption of the Final Assessment Resolution. The adoption of the Final Assessment Resolution shall be the final adjudication of the issues presented (including, but not limited to, the method of assessment, the Assessment Roll, the plans and specifications, the estimated cost of the Project, the levy and lien of the Assessments and the interest rate the Assessments shall bear, including the date from which such interest shall accrue, and the terms of prepayments of the Assessments) unless proper steps shall be initiated in a court of competent jurisdiction to secure relief within 20 days from the date of Board action on the Final Assessment Resolution. Notice of the Assessments shall be recorded in the Official Records Book in the office of the Clerk. Such notice shall provide in general the locations of the property which are assessed and direct interested parties to the Assessment Roll, upon approval thereof. The Final Assessment Resolution shall provide for the rate of interest or the method of determining the rate of interest which the Assessments shall bear, including the date from which such interest shall accrue. The amount of the Assessment against any lot or parcel which may be reduced or abated, unless the non-ad valorem assessment upon the entire Benefit Unit be reduced or abated, may be made chargeable against the applicable Benefit Unit.

(9) PAYMENT OF ASSESSMENTS. Except as otherwise provided by resolution of the Board, no prepayments of Assessments shall be accepted prior to the adoption of the Final Assessment Resolution. Thereafter, any prepayments shall be made only upon payment of applicable interest, including interest included as a cost of the related

improvement, and applicable prepayment premium at the office of the Clerk (or such other official as the Board shall designate by resolution to collect Assessments). The Clerk (or such other official as the Board shall determine by resolution) shall note (mechanically or electronically) on the Assessment Roll any prepayments. The Board, by resolution, may determine the time during which prepayments may be made and amount of interest (which may include interest from the date of such prepayment to the date on which Bonds or Notes may be redeemed) and prepayment premium payable at the time of payment. If not prepaid, all Assessment shall be payable in equal principal installments (unless otherwise provided by resolution of the Board), with interest on the outstanding balance at the rate and from the date set by the Final Assessment Resolution. Assessments shall be collected in the manner set forth in Section 21-44 hereof. Subject to the provisions of subsection (10) and (11) hereof, if Bonds or Notes are issued pursuant to the Ordinance, the Assessments shall bear interest at a rate not to exceed two percent above the true interest cost of such Bonds or Notes (provided the true interest cost on the Bonds and Notes may include any ongoing expenses related to the Bonds and Notes and collection of the Assessments), from the date the Final Assessment Resolution is adopted or such other date as the Board may provide by resolution, payable in each of the succeeding number of years which the Board shall determine by resolution; provided, however, that the Board may provide by resolution that any Assessment may be paid at any time before due, together with any applicable prepayment premium and interest accrued thereon to the date of payment or such later date as shall be determined by the Board by resolution, if such prior payment shall be permitted by the proceedings authorizing any Bonds or

Notes for the payment of which such Assessment shave [sic] been pledged.

(10) LIEN OF ASSESSMENTS. All Assessments shall constitute a lien against such property equal in rank and dignity with the liens of all state, county, district or municipal taxes and other non-ad valorem assessments. Except as otherwise provided by law, such liens shall be superior in dignity to all other liens, titles and claims, until paid.

(11) ADDITIONAL PAYMENTS. If Assessments made under the provisions of this Ordinance to defray the costs of the Project shall be deemed by the Board to be inadequate to meet the obligation owed to Bondholders and to pay fees required for credit enhancement on the Bonds, if any, the Board may adjust the payment period of the rate of interest on installment payments of the Assessment so that payments of Assessments shall be sufficient to satisfy the contractual obligation owed to Bondholders and the credit enhancement provider. However, such adjustment shall not have the effect of increasing the Assessment of any property, including the effect of increasing the amount of Assessment of any property in proportion to the amount of benefits conferred on that property. Further, the Board, in adjusting the interest rates and the period of payment of Assessments, shall follow the provisions of this Section 21-43 providing for passage of resolutions establishing Assessments.

(12) REVISIONS TO ASSESSMENTS.

(a) If any Assessment made under the provisions of this Ordinance to defray the costs of any Project shall be either in whole or in part annulled, vacated or set aside by the judgment of any court, or if the Board shall be satisfied that any such Assessment is so irregular or defective that the same cannot be enforced or collected, or if the Board shall have

omitted to include any property on the Assessment Roll which properly should have been so included, the Board shall take all necessary steps to cause a new Assessment to be made against any property benefited [sic] by any Project, following as nearly as may be practicable the provisions of this Ordinance and in case such second Assessment shall be annulled, the Board may obtain and make other Assessments until a valid Assessment shall be made.

(b) If the actual cost of the Project exceeds the estimated cost on which the Assessments were based, the Board may, at its option, increase the amount of the Assessment against all benefited [sic] properties within the Benefit Unit, following as nearly as may be practicable the provisions of this Ordinance and in case such increased Assessment shall be annulled, the Board may obtain and make other Assessments until a valid Assessment shall be made.

(c) If the actual cost of the Project is less than the estimated cost on which the Assessments were based, the Board shall reduce the Assessments to an amount consistent with the actual cost of the Project. Interest paid in respect of the Assessments prior to any such reduction shall not be affected; however, interest payments following any such reduction shall reflect the reduced principal amount of the Assessments. If any Assessment has been prepaid in full prior to the date of any such reduction, the amount of the reduction applicable to such Assessment shall be refunded to the owner of the assessed property as of the date of prepayment; provided however, that the County shall not be required to refund an amount less than $5.00 to any single owner.

(13) PROCEDURAL IRREGULARITIES. Any informality or irregularity in the proceedings in connection with the levy of any Assessment under the provisions of this

Ordinance shall not affect the validity of the same after the approval thereof, and any Assessment as finally approved shall be competent and sufficient evidence that such Assessment was duly levied, that the Assessment was duly made and adopted, and that all other proceedings adequate to such Assessment were duly had, taken and performed as required by the Ordinance; and no variance from the directions hereunder shall be held material unless it be clearly shown that the party objecting was materially injured thereby. Notwithstanding the provisions of this subsection (13) any party objecting to an Assessment imposed pursuant to this Ordinance must file an objection with a court of competent jurisdiction within the time periods prescribed herein.

(14) APPORTIONMENT OF ASSESSMENTS. The County may, by resolution, provide a procedure by which the lien of an Assessment on property may be apportioned between subdivided parcels of such property. Such apportionment shall be reflected on the Assessment Roll. The County may establish a different procedure of apportioning and Assessment lien for each Benefit Unit. The County shall not establish a procedure which has a material adverse effect on the security for Bonds issued to finance the Project related to such Assessments.

(15) CORRECTION OR ERRORS AND OMISSIONS.

(a) No act of error or omission on the part of the Property Appraiser, Tax Collector, Clerk, Assessment Coordinator, Board or their deputies or employees, shall operate to release or discharge any obligation for payment of an Assessment imposed by the Board under the provision of this Ordinance. Any errors or omissions may be corrected at any time by the Board, or its designee, and when so corrected

shall be considered valid ab initio and shall in no way affect the enforcement of the Assessment imposed under the provisions of this Ordinance.

(b) When it shall appear that any Assessment should have been imposed under this Ordinance against a lot or parcel of property specially benefited [sic] by the project, but that such property was omitted from the Assessment roll, the Board may, upon provision of appropriate notice as set forth in this Section 21-43, impose the applicable Assessment against such benefited [sic] property. The Assessment so imposed shall constitute a lien against such property equal in rank and dignity with the liens of all state, county, district or municipal taxes and non-ad valorem assessments, and superior in rank and dignity to all other liens, encumbrances, titles and claims in and to or against the real property involved and may be recorded as provided in subsection (7) and collected as provided in Section 21-44 hereof.

(c) The Board shall have the authority at any time, upon its own initiative or in response to a timely filed petition from the owner of any property subject to an Assessment, to correct any error or omission in the adoption of any Assessment roll, or in the implementation of this Ordinance, including, but not limited to, and error in inclusion or exclusion of any property.

SECTION 21-44. COLLECTION OF ASSESSMENTS.

(1) RESPONSIBILITY FOR ENFORCEMENT. It shall be the duty of the County and its agent, if any, to enforce the prompt collection of Assessments by the means herein provided. The duties related to collection of Assessments may be enforced at the suit of any holder of Bonds secured by such Assessments in a court of competent jurisdiction by mandamus or other appropriate proceedings or

action.

(2) COLLECTION BY FORECLOSURE. The County shall have the right to appoint an agent to foreclose and collect all delinquent Assessments in the manner provided by law. An Assessment shall become delinquent if it is not paid within 30 days from the date any installment is due. The County or its agent shall cause notice to be sent to any property owner who is delinquent in payment of his Assessment installment within 40 days from the date such installment was due. Such notice shall state in effect that the County or its agent shall initiate a foreclosure action within 90 days of the date of the installment due date if it is not paid. Between the 75th and 90th day after the due date of the delinquent property to be foreclosed in the method now or hereafter provided by law for foreclosure of mortgages on real estate, or otherwise as provided by law. Commencing on the 90th day after the due date of the delinquent installment, the County or its agent shall declare the entire unpaid balance of the Assessment to be in default and cause the delinquent property to be foreclosed as described above. Any Board action required in the collection of Assessments may be by resolution. All costs, fees and expenses, including reasonable attorney fees, related to any foreclosure action as described in Section 5.02 hereof shall be borne by the delinquent property owner. At the sale pursuant to decree in any such action, the County may be the purchaser to the same extent as an individual person or corporation.

(3) JOINDER OF ACTIONS. The County may join in one action the collection of Assessments against any or all property assessed in accordance with the provisions hereof. All delinquent property owners whose property is foreclosed shall pay reasonable costs and expenses incurred by the County

and its agents, including reasonable attorney fees, in collection of such delinquent Assessments and any other costs incurred by the County as a result of such delinquent Assessments (including costs paid for draws on a credit facility), and the same shall be collectible as a part of or in addition to, the costs of the action.

(4) PAYMENT DURING FORECLOSURE PROCEEDINGS. If prior to any sale of the property under decree of foreclosure in such proceedings, payment is made of the amounts then due pursuant to the Final Assessment Resolution, and all costs, fees and expenses of the County and its agent, as a result of such delinquent Assessments, including reasonable attorney fees and costs for draws on a credit facility, such payment, unless otherwise provided by resolution of the Board, shall have the effect of restoring any remaining installments in respect of an Assessment to their original maturities and the proceedings shall be dismissed.

(5) USE OF ALTERNATIVE COLLECTION METHOD. In the event the Board utilizes the alternative method of collection of Assessments as described in subsection (6) hereof, the provisions of subsections (1) through (4) hereof shall be superseded to the extent of any conflict with applicable law or any agreement between the County and the Property Appraiser or Tax Collector relating to such alternative method. The County shall provide such information to the Property Appraiser and the Tax Collector as shall be necessary to collect the Assessments pursuant to such alternative method.

(6) COLLECTION BY TAX COLLECTOR. As an alternative method to collection by the Clerk as provided in subsections (1) through (4) hereof, the Board may, either at the public hearing held pursuant to subsection (7) hereof or at such other time as it deems appropriate, authorize the

collection of Assessments in the manner provided for the collection of ad-valorem taxes. Such alternative method shall be authorized by resolution of the Board and the County shall comply with all applicable provisions of law relating to such alternative method, including Section 197.363, 197.3631 and 197.3632, Florida Statutes, and any successor provision thereto. In the event such alternative method is used by the County, the provisions hereof shall be superseded to the degree of any conflict with applicable law or with any agreement between the County and the Property Appraiser or the Tax Collection [sic] relating to such alternative method. Any hearing or notice required by the Ordinance may be combined with any other hearing or notice required to collect the Assessments on the same bill as ad valorem taxes. Assessments relating to an individual Project shall be collected either by the method described in subsection (1) through (4) hereof or in this subsection (6), not be [sic] both methods.

SECTION 21-45. ISSUANCE OF BONDS.

(1) GENERAL AUTHORITY. Upon adoption of the Final Assessment Resolution or at any time thereafter, the Board shall have the power and it is hereby authorized to provide by resolution, at one time or from time to time in series, for the issuance of Bonds of the County for the purpose of paying all or part of the cost of the Projects. The principal of the interest on each series of Bonds shall be payable from Pledged Revenues. At the option of the Board, the county may covenant to budget and appropriate from non-ad valorem revenue sources identified by the County by resolution or from General non-ad valorem revenues of the County an amount necessary to make up any deficiency in the payment of the Bonds. The County may issue a single series of Bonds to finance Projects in different Benefit Units, provided such

resolution identifies each Project to be financed and the Benefit Unit in which it is located.

(2) TERMS OF THE BONDS. The Bonds shall be dated, shall bear interest at such rate or rates, shall mature at such times, as may be determined by resolution of the Board, and may be made redeemable before maturity, at the option of the County, at such price or prices and under such terms and conditions as may be fixed by the Board. Said Bonds shall mature not later than two years after the last installment in which said Assessments may be paid, as provided in Section 21-43(9) hereof, and shall bear interest at a rate not exceeding the maximum rate provided by law. The Bonds may, at the option of the Board, bear interest at a variable rate. The Board shall determine by resolution the form of the Bonds, the manner of executing such Bonds, and shall fix the denomination or denominations of such Bonds, the place or places of payment of the principal and interest, which may be at any bank or trust company within or without the State of Florida, and such other terms and provisions of the Bonds as it deems appropriate. The bonds may be sold at public or private sale for such price or prices as the Board shall determine by resolution. The Bonds may be delivered to any contractor for payment for his work in constructing a Project or may be sold in such manner and for such price as the Board may determine by resolution to be for the best interests of the County.

(3) VARIABLE RATE BONDS. The County may, at its option, issue Bonds bearing a variable rate of interest, whereupon the interest rate and installment payments applicable to Assessments shall be subject to adjustment as provided by resolution of the Board. In such event, the County may impose on such annual installment payment such rate of

interest as shall not exceed the maximum amount permitted by Section 21-43(9) hereof as shall be determined on the 15th day prior to the date the Assessment Roll is certified for collection to the Clerk or the Tax Collector, as appropriate. If amounts of interest collected by the County exceed, in the aggregate, the amount of interest that would have been collected if interest was imposed at the maximum rate permitted to be charged on Assessments as provided in Section 21-43(9) hereof, the excess amounts shall be credited to the next installment of the Assessment or be returned to the property owners who paid such amounts, as provided by resolution of the Board. If the amounts of interest collected by the County are less, in the aggregate, than the amount of interest that would have been collected if interest was imposed at the maximum rate permitted to be charged on Assessments as provided in Section 4.09 hereof, such deficiency may be imposed as a surcharge on the next installment.

(4) TEMPORARY BONDS. Prior to the preparation of definitive Bonds of any series, the Board may, under like restriction, issue interim receipts, interim certificates, or temporary bonds, exchangeable for definitive Bonds when such bonds have been executed and are available for delivery. The Board may also provide for the replacement of any Bonds which shall be come mutilated, or be destroyed or lost. Bonds may be issued without any other proceedings or the happening of any other conditions or things than those proceedings, conditions or things which are specifically required by the Ordinance.

(5) BOND ANTICIPATION NOTES. In anticipation of the sale of Bonds, the County may, by resolution, issue Notes and may renew the same from time to time. Such Notes may be paid from the proceeds of the Bonds,

the proceeds of the Assessments, the proceeds of the Notes and such other legally available moneys as the Board deems appropriate. Said Notes shall mature within five years of their issuance and shall bear interest at a rate not exceeding the maximum rate provided by law. The Board may issue Bonds or renewal Notes to repay the Notes. The proceeds of the Bonds and Notes, unless otherwise used to refund Bonds or Notes, shall be used to pay the costs of the Projects. The Notes shall be issued in the same manner as the Bonds.

(6) NEGOTIABLE INSTRUMENTS. Bonds and Notes shall be, and shall be deemed to be, for all purposes, negotiable instruments, subject only to the provisions of the Bonds and Notes for registration.

(7) TAXING POWER NOT PLEDGED. Bonds issued under the provisions of this Ordinance shall not be deemed to constitute a pledge of the faith and credit of the County or any Benefit Unit, but such Bonds shall be payable only from Pledged Revenues in the manner provided herein and by the resolution authorizing the Bonds. The issuance of Bonds under the provisions of this Ordinance shall not directly or indirectly obligate the County or any Benefit Unit to levy or to pledge any form of ad valorem taxation whatever therefore. No holder of any such Bonds shall ever have the right to compel any exercise of the ad valorem taxing power on the part of the County or any Benefit Unit to pay any such Bonds or the interest thereon or to enforce payment of such Bonds or the interest thereon against any property of the County or any Benefit Unit, nor shall such Bonds constitute a charge, lien or encumbrance, legal or equitable, upon any property of the County or any Benefit Unit, except the Pledged Revenues.

(8) SECURITY FOR BONDS. During any period in which Bonds are outstanding, the Pledged Revenues shall be

deemed to be funds held for the benefit of Bondholders, to be held and applied solely as provided in this Ordinance and in the resolution authorizing the Bonds.

(9) REMEDIES OF BONDHOLDERS. Any holder of Bonds, except to the extent of rights herein given may be restricted by the resolution authorizing issuance of the Bonds, may, whether at law or in equity, by suit, action, mandamus or other proceedings, protect and enforce any and all rights under the laws of the state or granted hereunder or under such resolution, and may enforce and compel the performance of all duties required by this part, or by such resolution, to be performed by the County.

(10) NO REFERENDUM REQUIRED. No referendum or election in the County or any Benefit Unit shall be required for the exercise of any of the provisions of this Ordinance, unless such referendum or election is required by the Constitution of the State of Florida.

(11) REFUNDING BONDS. The County may, by resolution of the Board, issue Bonds to refund any Bonds issued pursuant to this Ordinance and provide for the rights of the holders hereof. Such refunding Bonds may be issued in an amount sufficient to provide for the payment of the principal of, redemption premium, if any, and interest on the outstanding Bonds to be refunded. In the event the principal amount of the refunding Bonds shall be greater than the outstanding principal amount of the Bonds to be refunded, the Board may increase the non-ad valorem assessments which secure such refunding Bonds up to an amount not to exceed the difference between the respective principal amounts of the refunding Bonds and the outstanding refunded Bonds, provided notice to the affected property owners is given in accordance with the notice provisions of Section 21-43 hereof

and a public hearing is held by the Board.

SECTION 2. SEVERABILITY. The provisions of this Ordinance are severable; and if any section, subsection, sentence, clause or provision is held invalid by any court of competent jurisdiction, the remaining provisions of this Ordinance shall not be affected thereby.

SECTION 3. ALTERNATIVE METHOD. This Ordinance shall be deemed to provide an additional and alternative method for the doing of the things authorized hereby and shall be regarded as supplemental and additional to powers conferred by other laws, and shall not be regarded as in derogation of any powers now existing or which may hereafter come into existence. The Ordinance, being necessary for the welfare of the inhabitants of the County, shall be liberally construed to effect the purposes hereof.

SECTION 4. EFFECTIVE DATE. This Ordinance shall take effect immediately upon its adoption and filing as provided by law.

DONE, ORDERED AND ADOPTED in regular session this 23rd day of July 1991.

Board of County Commissioners
of Brevard County, Florida

/s/_____
Sue Schmit, Chairman

ATTEST:

/s/_____
R.C. Winstead, Jr., Clerk

(SEAL)

ORDINANCE NO. 93-27

AN ORDINANCE OF BREVARD COUNTY, FLORIDA, CREATING PROVISIONS FOR THE ISSUANCE OF BUILDING PERMITS ON PRIVATE ROADS, UNPAVED ROADS, AND INGRESS/EGRESS EASEMENTS TO PUBLIC ROADS; AMENDING ARTICLE II OF CHAPTER 14, "ZONING AND BUILDING REGULATIONS" BY CREATING A NEW DIVISION 4 ENTITLED "ISSUANCE OF BUILDING PERMITS ON UNPAVED ROADWAYS AND ACCESS EASEMENTS;" PROVIDING FOR CONFLICTING PROVISIONS; PROVIDING FOR SEVERABILITY; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, Chapter 14, Article II, Division 4, Brevard County Code, requires that property abut a public street in order for a building permit to be issued on the subject property; and

WHEREAS, Chapter 14, Article II, Division 4, Brevard County Code, provides an exception for parcels which do not abut on a public street if a parcel meets the criteria set forth for private roads or ingress/egress easement; and

WHEREAS, Brevard County wished to expand the criteria for the uses of unpaved road to allow limited growth in rural residential areas while preventing urban sprawl; and

WHEREAS, Brevard County wished to provide similar provisions for easements and flag stems.

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF BREVARD COUNTY, FLORIDA, as follows:

SECTION 1. Chapter 14, Article II, Brevard County Code, is hereby amended to establish a new Division 4, entitled "Issuance of Building Permits on Unpaved Roadways and

Access Easements" which reads as follows:

CHAPTER 14. LAND DEVELOPMENT REGULATIONS

ARTICLE II. ZONING, SUBDIVISION, AND SITE PLAN REGULATIONS, PRIVATE ROAD REGULATIONS

(A) Definitions.

For the purposes of this Section, the following definitions shall apply:

1. Access: An exclusive easement or other exclusive perpetual and right of ingress or egress, for all parcels eligible under this ordinance which has been recorded in the Public Records of Brevard County, Florida.
2. Flag Lot: Any lot, plot, tract, or parcel of land having a narrow, deeded strip of land connecting the main body of said lot, plot, tract, or parcel to a dedicated, accepted road, as defined in the Brevard County Zoning Regulations.
3. Private Road: A road, street, or right-of-way utilized by the abutting properties only, which road, street, or right-of-way is not dedicated, accepted, or maintained by Brevard County.
4. Public Street: Any street, road, or easement dedicated to and accepted by the Board of County Commissioners of Brevard County, Florida, built to the specification for paved or unpaved roads adopted by Brevard County, Florida, and maintained by Brevard County.
5. Single-Family Residence: A private residence building used or intended to be used as a home or residence in which the use and management of all sleeping quarters, all appliances for sanitation, cooking, ventilation, heating, and lighting are designed primarily for the use

of one family unit.

6. Unpaved Road: Any road stabilized to a lime rock bearing ratio of 40 (LBR 40) and provide a stormwater system which would be reviewed and constructed in an existing public right-of-way. All construction should be completed in accordance with the Subdivision and Site Plan Regulations, current stormwater ordinance, and landclearing regulations.

(B) Criteria for Issuance of Building Permits.

1. Except as specifically provided in this Section, no building permits shall be issued by Brevard County for use on a parcel, unless that parcel abuts on a public street, as defined herein.

2. Exceptions: For parcels which do not abut on a public street, building permits may be issued for said parcels in the following circumstances:

(a) Private Roads: Building permits for single-family residential structures, and appurtenant structures, may be issued for parcels utilizing private roads within recorded subdivisions, where such private roads connect directly to a public street, and where said private road is shown on a subdivision platted and recorded in the Public Records of Brevard County, Florida, and if, in the opinion of the Board of County Commissioners of Brevard County, Florida, the private road meets the following requirements:

1. That the private road must be constructed to those design specifications set forth in the Brevard County Subdivision Regulations and maintained by the applicant or homeowners association; and

2. That the private road shall not restrict public access to any Brevard County right-of-way, or preclude or obstruct any existing or planned public road or street systems; and

3. Public utilities and emergency vehicles shall be granted the use of the private road, and, under no circumstances, shall such use be restricted; and

4. The private road shall not include a street, road, right-of-way, or easement dedicated to Brevard County or "the public."

(b) Access by Easement: Building permits for single-family residential structures, and appurtenant structures, may be issued for parcels which do not abut on a public street, when it can be shown that the parcel has access to a public street through a perpetual and irrevocable right of access, and such access shall not include a street, road, right-of-way or easement dedicated to Brevard County or "the public" by a plat or other recorded instrument; provided, however, that the following criteria have been met:

1. That the parcel is of unique dimension or character, such that direct access by abutting on a public street is not feasible; and

2. That the parcel cannot be established as a flag lot, pursuant to the provisions of the Brevard County Zoning Regulations; and

3. That the access is at least twenty-five (25) feet wide; and

4. That the access is cleared, graded and

maintained so as to assure access by emergency vehicles; and

5. That the access is not within a flag lot access strip, except where said flag lot is five (5) acres or more in size; and

6. That the access is for the exclusive use of the parcel for which the building permit is to be issued, except as stated in 8; and

7. That the access is not within ninety (90) feet of the nearest private access easement utilized for building permit purposes under this Section.

8. That the access is for no more than two parcels. The sum of the parcels served by the easement shall be a minimum of five (5) acres in size.

9. No more than two easements will be allowed per access strip.

10. Only one easement shall be permitted over any flag stem.

11. This easement ordinance shall not apply to any prior easements approved by Brevard County and designated on Brevard County Zoning maps.

(c) Unpaved Road Agreements: The Board of County Commissioners and the property owners whose property abuts a right-of-way which is not maintained by the County may enter into an agreement to allow the issuance of a single-family residence structure building permit under the following conditions:

1. These agreements shall be limited to existing County rights-of-way of at least fifty feet (50')

in width. If a right-of-way exists of less than fifty feet (50') in width, additional easements, dedicated to Brevard County, may be obtained on each side of the right-of-way by the owner for drainage and sidewalk purposes to bring the total width to fifty feet (50').

Any requests for deviation shall be made as part of the application process and will be reviewed by the Land Development Division and the Engineering Office for a determination.

The waiver to access width shall not be approved unless it is consistent with the intent and purpose of the Dirt Road Ordinance including the following:

A. The particular physical conditions, shape, or topography of the specific property involved causes an undue hardship to the applicant if the strict letter of the ordinance is carried out;

B. The granting of the waiver will not be injurious to the other adjacent property;

C. The conditions upon which a request for waiver are based are peculiar to the property for which the waiver is sought and are not generally applicable to other property and do not result from actions of the applicant; and

D. The waiver is consistent with the intent and purpose of the Brevard County Zoning Regulations, the County Land Use Plan of Brevard County, and the requirements of this ordinance.

E. For the preservation of vegetation as identified on a vegetation plan as long as engineering and safety concerns are satisfied.

Any acquisition costs associated with the right-of-way and easements will be borne solely by the property owner. The traveling surface of the road will be centered within the right-of-way.

2. Only those properties within 1,320' of a County maintained roadway are eligible.

3. Individual lots, parcels or tracts of land must have a minimum area of 0.9 acre to be eligible to enter into an unpaved road agreement with the County.

4. Each lot, parcel or tract of land must meet all of the requirements of the Comprehensive Plan, shall satisfy all criteria of the Consumer Health Division, and shall meet all the requirements of the Natural Resources Division and land clearing regulations to issuance of a building permit.

5. There shall be a limitation of one agreement per property owner which is not transferable, and shall have a time limitation of one year.

6. By entering into an agreement, the property owner is responsible for all costs related to the roadway including survey, design, engineering, permitting, and construction. The roadway would be designed and stabilized to a minimum of LBR 40 and would be reviewed and inspected by the County Engineer or his designee, for approval prior to the issuance of a building permit. Additionally, to defer the cost of County maintenance, the agreement shall stipulate a fixed amount that must be paid prior to execution of the agreement. This amount

would be determined by the Transportation Department and adopted by resolution in an amount necessary to reimburse Brevard County for maintenance costs.

7. Upon entering into the agreement, the property owner shall also agree that once more than fifty percent (50%) of the buildable lots have been issued building permits, the property owners will participate in a Municipal Service Benefit Unit (MSBU) for paving of the road.

8. Where the subject roadway on which the agreement applies intersects with an existing County maintained dirt road, and where all buildable lots abutting the subject roadway are 2.5 acres or larger in area, the property owner would not be required to participate in the establishment of a Municipal Service Benefit Unit (MSBU) for paving of the street.

(C) Application Procedure.

Any person seeking the issuance of a building permit, under the provisions of this Section, shall submit an application with the Brevard County Building and Development Department, on such form as provided by the Brevard County Building and Development Department, together with such application fee as may be adopted by resolution by the Board of County Commissioners of Brevard County, Florida. Said application shall include, at a minimum, the following:

(1) A copy of the deed or instrument indicating current ownership of the parcel; and

(2) A copy of the deed or instrument indicating applicant's interest in the subject parcel; and

(3) A copy of the Brevard County Property

Appraiser's map of the subject parcel, indicating all properties within five hundred feet (500') of the subject parcel.

(4) A copy of the land clearing application and plan of the limits of clearing. (Note: Fees are not required but notification of surrounding owners may be required."

(D) Review.

Any applicant who is aggrieved by any decision by the Director of the Brevard County Land Development Division that the subject parcel does not comply with the criteria set forth in this Section, may, within thirty (30) days after the date of the decision of the Land Development Division Director, or his designee, apply to the Board of County Commissioners of Brevard County, Florida, for review of the Director's decision.

SECTION 2. Conflicting Provisions. In the case of direct conflicts between any provision of this ordinance and a portion or provision of any other appropriate federal, state or county law, rule, code, or regulation, the more restrictive shall apply.

SECTION 3. Severability. If any provision of this ordinance or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provision or application, and to this end the provisions of this ordinance are declared severable.

SECTION 4. Effective Date. This ordinance shall take effect pursuant to general law.

DONE, ORDERED AND ADOPTED, in special session, this 10th day of November , 1993.

BOARD OF COUNTY COMMISSIONERS
OF BREVARD COUNTY, FLORIDA
/s/Karen S. Andreas, Chairman
ATTEST:
/s/Sandy Crawford, Clerk

Brevard County
Board of County Commissioners
Florida's Space Coast

Sandy Crawford, Clerk to the Board, 700 Park Avenue,
Titusville, Florida 32780
Bernadette S. Talber, Deputy Clerk (407)264-5240
October 19, 1994

MEMORANDUM

TO: Tom Lundeen, Engineering Projects Management Director

RE: Proposed MSBU Ordinance and Financing Options for Privately-initiated Infrastructure Projects in Undeveloped Areas

The Board of County Commissioners, in regular session on October 18, 1994, directed the MSBU mechanism not be used to fund private development; directed staff to report to the Board on Option 2, the cost reimbursement program; approved an administrative fee of 10% with 1% to go to the Finance Department; endorsed the proposed resolution establishing schedule of fees and charges; and directed staff to bring back different options concerning minimum percentage of support required to implement an MSBU, with waiver provisions. Enclosed is a copy of the Agenda Report.

Your continued cooperation is greatly appreciated.

Sincerely yours,

BOARD OF COUNTY COMMISSIONERS
SANDY CRAWFORD, CLERK
/s/Bernadette Talbert, Deputy Clerk

Encl.(1)

cc: Community Development Administrator
Engineering Director

IN THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

FARM & GROVE REALTY COMPANY,

Plaintiff, Case No. 96-4509-CAD

v.

BREVARD COUNTY, a political subdivision of the State of Florida,

Defendant.

_____/

ACTION FOR DECLARATORY RELIEF AND DAMAGES FOR TAKING OF REAL PROPERTY AND FOR DENIAL OF CIVIL RIGHTS

Comes Now the Plaintiff, Farm & Grove Realty Company (Farm & Grove), by and through its undersigned attorney; and brings this Action for Declaratory Relief, for Damages For Taking of Real Property and for Denial of Civil Rights against the Defendant, Brevard County (County) and says:

1. Plaintiff, Farm & Grove, is a Florida corporation with its principal place of business in Brevard County, Florida. Defendant, County, is a political subdivision of the State of Florida. Venue is proper in this court.

2. This suit pertains to the validity of Ordinances, Resolutions, Rules and Policies as they pertain to Plaintiff's real property located in Brevard County. The amount in controversy exceeds the sum of $15,000; exclusive of interest, costs and fees.

3. At all times pertinent hereto, Farm & Grove was the owner of a 1.5 acre parcel of land located near Valkaria Road in unincorporated Brevard County, which parcel is known as Tract 184 of Cape Kennedy Estates, and legally described as:

The east half of the south 200 feet of the north 3/4 of

Lot 5, Section 23, Township 29 South, Range 37 East; per plat of Florida Indian River Land Co., as recorded In Plat Book 1, at Page 165, Brevard County, Florida; less the east 25 feet for road, utility and drainage right of way.

4. The character of the area is rural residential and there are a number of homes presently built and occupied in the area. Zoning is AU, "Agriculture".

5. Farm & Grove paid an agreed market price for the parcel and had a reasonable, investment-backed expectation of profit therefrom. The parcel is served by a duly recorded road easement to connect it to Valkaria Road; however, no road presently exists nor was any road required of the original subdivider by Defendant County upon the creation of this subdivision, nor at the time Farm & Grove acquired its interest in the property.

6. Defendant, County, asserts governmental jurisdiction and control over the real property and has enacted ordinances and has undertaken other governmental actions to control the use and enjoyment of the property.

7. Plaintiff wishes to sell the property as a single-family residential lot so as to realize its reasonable, investment-backed expectation. This use is the only reasonable use for the property allowed by the zoning and is not only the highest and best use thereof but also the only practical use.

8. That among the rules and regulations imposed after the acquisition of the property by Plaintiff was the requirement that all homes thereafter constructed in Brevard County would be served by a county-approved road. (Ordinance 82-6, Exhibit A hereto.)

9. Because of the ordinances and regulations

supplementing same, a road approximately 993 feet in length is required. The construction of the road would allow 9 other lot owners to obtain permits to construct homes where such right does not presently exist without these other owners paying for and installing all or a portion of the road improvements.

10. Plaintiff's lot presently is unmarketable and substantially valueless because of the actions complained of. The neighboring lots have the same approximate value. When the road is installed, this lot and each of the other 9 lots would have a fair market value of approximately $35,000 each if served by a paved road and approximately $26,000 each if served by an unpaved road.

11. In order to construct paved roads within the county the creation of a special tax district (MSBU) is required pursuant to Article II, Section 98-36 of Brevard County Code, (Exhibit B hereto) (the MSBU Ordinance). Under this plan 100% of the road cost is apportioned among the benefitted lots and an assessment lien for the apportioned amount is levied upon each lot.

12. The County Commission has, by formal Resolution, (Exhibit C hereto), denied the use of the MSBU ordinance to undeveloped areas such as the subject property. So, while Farm & Grove is required to have its land served by a county owned and approved road in order to be useable and saleable, it is denied the ability to seek a paved road, even if all of the cost thereof is borne not by the County at large but only by these benefitted lot owners.

13. Therefore, the only other course remaining open to Farm & Grove to obtain a road is to have an unpaved road permitted and installed at Farm & Grove's sole expense and responsibility. This is required by County Ordinance 93-

27, a copy of which is attached hereto as Exhibit D, (the Unpaved Road Ordinance). The road is built upon a county-owned right of way and is open to public use.

14. Because of the provisions of the Unpaved Road Ordinance, Farm & Grove must bear all the costs of the mad The cost is estimated as $29,000, which is $ 3,000 more than the ultimate fair market value of its lot. Moreover, since this ordinance, unlike the MSBU Ordinance, does not provide for cost sharing; Farm & Grove's neighbors will be unjustly enriched by the rise In market value of their lots and their immediate desirability and saleability, at no cost to themselves.

15. If the Unpaved Road Ordinance had a cost-sharing provision providing equitable contribution in the same manner as for paved roads under the MSBU ordinance, then the cost could be apportioned at $2,900 per lot, a reasonable burden. The enactment of such a cost-sharing provision was requested by Farm & Grove but was finally refused by the County Commission on October 17, 1995 (Exhibit E hereto). Farm & Grove has exhausted its administrative remedies and this matter is ripe for judicial review.

16. The actions of County have damaged Plaintiff as follows:

a) Such actions, by themselves, contravene the Constitution of the United States; and, especially, the 5th and 14th Amendments.

b) Such actions, by themselves, contravene the Constitution of the State of Florida.

c) Such actions, as applied to Plaintiff's property, contravene the Constitution of the United States, and, especially, the 5th and 14th

Amendments.

d) Such actions, as applied to Plaintiff's property, contravene the Constitution of the State of Florida.

e) Such actions deny the Plaintiff any reasonable and/or substantial economic use and/or value of its property.

f) Such actions are a thinly disguised method to create an unfair and illegal and confiscatory tax or condition upon Plaintiff's property which results in a permanent inordinate burden thereon.

g) Such actions have denied Plaintiff the use of its property without due process.

h) Such actions have denied Plaintiff of equal protection of the law.

i) Such actions are arbitrary and capricious as applied to Plaintiff's property.

j) Such actions constitute a taking by Inverse Condemnation without just compensation therefore.

k) Such actions have taken valuable property rights previously vested in Plaintiff without just compensation.

l) Such actions, if not permanent, amount to a temporary taking for which compensation is due.

17. Such actions violate Plaintiff's rights as protected by Title 42, Section 1981, et seq, of the United States Code and, especially, Section 1983.

COUNT I

Declaratory Relief

18. The actions complained of hereinabove require Plaintiff to have its rights, as pertains to the use of said

property, declared; and it seeks Declaratory Relief and ancillary relief pursuant to Chapter 86, Florida Statutes.

19. Because of the County's actions, Farm & Grove has been required to employ the services of the undersigned attorney and to pay a reasonable fee and to incur the costs of this suit. Such costs are to be paid by the taking authority (County) under the laws of Eminent Domain and per said Constitutions or as otherwise provided by law.

20. Farm & Grove demands trial by jury.

Wherefore, Farm & Grove prays that this Court will grant relief from such unreasonable restraint upon the use of its property by declaring the various acts and ordinances of the County to be unconstitutional, per se; or, as applied under these facts, as to this land; or will, in the alternative, declare such acts to constitute a taking and will award full compensation therefore. Farm & Grove prays for such further relief as may be appropriate in the circumstances.

COUNT II

Damages and Fees for Taking of Property Without Just Compensation in Violation of the Fifth and Fourteenth Amendments to the U.S. Constitution

21. By reason of the matters set forth above there is no way in which Farm & Grove may realize the use and/or investment-backed value of the property. Its value lies only by use as a single-family residence site. A residence can only be built if a road is installed per County ordinances and regulations. The cost of such a road exceeds the value of the lot in its saleable state. At the same time neighboring lot owners are now free to sell their property as residential lots

without contribution or assessment.

22. The result of this over-regulation and inequitable application is to effect a taking by County of said land without just compensation and contrary to the provisions of the Fifth and Fourteenth Amendments to the U.S. Constitution.

23. Farm & Grove has been denied just compensation as required by law. Its only remedy is an award of lust compensation pursuant to the doctrine of inverse condemnation.

24. Because of the County's actions, Farm & Grove has been required to employ the services of the undersigned attorney and to pay a reasonable fee and to incur the costs of this suit. Such costs are to be paid by the taking authority (County) under the laws of Eminent Domain and per said Constitution or as otherwise provided by law.

25. Farm & Grove demands trial by jury.

Wherefore, Plaintiff prays that this Court will award just compensation for the taking, including interest, costs and fees. Farm & Grove prays for such further relief as may be appropriate in the circumstances.

COUNT III

Damages and Fees For Taking of Property Without Due Process In Violation of the Fifth and Fourteenth Amendments to the U.S. Constitution

26. The property of Plaintiff, which had previously been marketable as and valuable for a single-family residential home lot has, as the result of the aforesaid regulations applied thereto, been restricted to the point that its value has been lost.

27. That the regulatory taking of all value thereof constitutes a taking without due process as required by the U.S. Constitution; and, especially, the Fifth and Fourteenth Amendments thereto.

28. Because of the County's actions, Farm & Grove has been required to employ the services of the undersigned attorney and to pay

a reasonable fee and to incur the costs of this suit. Such costs are to be paid by the taking authority (County) under the laws of Eminent Domain and per said Constitution or as otherwise provided by law.

29. Farm & Grove demands trial by jury.

Wherefore, Plaintiff prays that this Court will award lust compensation for the taking, including interest, costs and fees. Farm & Grove prays for such further relief as may be appropriate in the circumstances.

COUNT IV

Unconstitutional As Arbitrary and Capricious

30. The effect of the regulations complained of require one property owner to bear the entire burden of a public improvement while at the same time increasing the value of his neighbors' properties without cost.

31. The imposition of such regulations are arbitrary and capricious, without basis in law or fact, and result in the denial to Plaintiff of its property without due process in violation of the U.S. Constitution; and, especially, the Fifth and Fourteenth Amendments thereto.

32. Because of the County's actions, Farm & Grove has been required to employ the services of the undersigned attorney and to pay a reasonable fee and to incur the costs of this suit. Such costs are to be paid by the taking authority (County) under the laws of Eminent Domain and per said Constitutions or as otherwise provided by law.

33. Farm & Grove demands trial by jury.

Wherefore, Plaintiff prays that this Court will find said regulations to be arbitrary and capricious, per se; or, as applied to Plaintiff's property, and will enjoin Plaintiff from enforcing same as applied to said property and will award Plaintiff damages, interest, costs and fees. Farm & Grove prays for such further relief as may be appropriate in the circumstances.

COUNT V

Denial of Equal Protection of the Law

34. The denial of the use of the MSBU Ordinance for property such as Plaintiff's, while allowing its use in similar areas for similar roads, is to create two classes and Plaintiff is in the class denied the rights thereof.

35. The structure of the Unpaved Road Ordinance which places the entire burden upon the first owner creates two classes of property affected thereby, one with 100% of the burden and one with no burden. Plaintiff's land is in the class with 100% of the burden.

36. Such regulations deny Plaintiff its rights of Equal Protection of the laws guaranteed by the U.S. Constitution; and, especially, the Fifth and Fourteenth Amendments thereto.

37. Because of the County's actions, Farm & Grove has been required to employ the services of the undersigned attorney and to pay a reasonable fee and to incur the costs of this suit. Such costs are to be paid by the taking authority (County) under the laws of Eminent Domain and per said Constitutions or as otherwise provided by law.

38. Farm & Grove demands trial by jury.

Wherefore, Plaintiff prays that this Court will find said regulations to be arbitrary and capricious, per se; or, as applied to Plaintiff's property, and will enjoin Plaintiff from enforcing same as applied to said property and will award Plaintiff damages, interest, costs and fees. Farm & Grove prays for such further relief as may he appropriate in the circumstances.

COUNT VI

Damages Per Title 42, Section 1981, USC et seq, For Denial of Civil Rights

39. This is a civil action for damages and Injunctive relief against said Defendants for acts committed under color of state law

which deprived Plaintiff of rights secured under the Constitution and Laws of the United States of America; and, especially, the Fifth and Fourteenth Amendments thereto; all with intent to deny Plaintiff its property without due process, without equal protection of the laws, and for refusing to prevent such deprivation and denial.

40. This action is brought pursuant to Title 42 United States Code, Sections 1981, et seq

41. At all times pertinent hereto Defendant, County, asserted governmental control over Plaintiff's property.

42. The enactment of the Ordinances and regulations specified above were intended to slow the growth in this part of Brevard County by denying fair and equal rights as granted to the rest of the land in the County.

43. The enactment of the ordinances and regulations specified above are an attempt to Impose an illegal, unequal, confiscatory, and unequitable tax upon Plaintiff's property.

44. As the results of the acts of these Defendants, Plaintiff has been denied of due process under the Constitution of the United States and per said laws and regulations.

45. As the results of the acts of these Defendants, Plaintiff has been denied of equal protection afforded by the Constitution of the United States and per said laws.

46. As the result of these acts of these Defendants, the value of Plaintiff's property has been severely diminished resulting in an appropriation without compensation as required by the United States Constitution and these laws and regulations.

47. The aforesaid acts, and the injuries suffered thereby are violations of the Constitution and laws of the United States and, especially, the Fifth and Fourteenth Amendments thereto as well as the Constitution of the State of Florida.

48. Relief for said acts is afforded by Title 42 Section 1981 et

seq of the United States Code.

49. Because of the County's actions, Farm & Grove has been required to employ the services of the undersigned attorney and to pay a reasonable tee and to incur the costs of this suit. Such costs are to be paid by the taking authority (County) under the laws of Eminent Domain per said Constitution, or per Title 42, Section 1988, or as otherwise provided by law.

50. Farm & Grove demands trial by jury.

Wherefore, Farm & Grove prays that this Court will grant relief from such unreasonable restraint upon the use of its property by declaring the various acts and ordinances of the County to be unconstitutional as applied under these facts as to this land; or will, in the alternative, declare such acts to constitute a taking and will award hill compensation therefore. Farm & Grove prays for such further relief as may be appropriate in the circumstances.

COUNT VII

Damages For Violation of Article 1, Sections 2, 9, and 10 of the Florida Constitution

51. This is a civil action for damages and injunctive relief against the Defendant for acts committed under color of state law which deprived Plaintiff of rights secured under the Constitution and laws of the State of Florida; and, especially, Article 1, Sections 2, 9, and 10 thereof; all with intent to deny Plaintiff's its property without due process, without equal protection of the laws and for refusing to prevent such deprivation and denial.

52. This action is brought pursuant to Article 1, Sections 2, 9, and 10 of the Constitution of the State of Florida.

53. At all times pertinent hereto Defendant, County, asserted governmental control over Plaintiff's property.

54. The enactment of the Ordinances and regulations specified above were intended to slow the growth in this part of Brevard County by denying fair and equal rights as granted to the rest of

the land in the County.

55. The enactment of the ordinances and regulations specified above are an attempt to impose an illegal, unequal, confiscatory, and unequitable tax upon Plaintiff's property.

56. As the results of the acts of these Defendants, Plaintiff has been denied of due process under the Constitution of the State of Florida and per said laws and regulations.

57. As the results of the acts of these Defendants, Plaintiff has been denied of equal protection afforded by the Constitution of the State of Florida and per said laws.

58. As the result of these acts of these Defendants, the value of Plaintiff's property has been severely diminished resulting in an appropriation without compensation as required by the Florida Constitution and these laws and regulations.

59. The aforesaid acts, and the injuries suffered thereby are violations of the Constitution and laws of the State of Florida; and, especially, Article 1, Sections 2, 9, and 10.

60. Because of the County's actions, Farm & Grove has been required to employ the services of the undersigned attorney and to pay a reasonable fee and to incur the costs of this suit. Such costs are to be paid by the taking authority (County) under the laws of Eminent Domain per said Constitution, or as otherwise provided by law.

61. Farm & Grove demands trial by jury.

Wherefore, Farm & Grove prays that this Court will grant relief from such unreasonable restraint upon the use of its property by declaring the various acts and ordinances of the County to be unconstitutional as applied under these facts as to this land; or will, in the alternative, declare such acts to constitute a taking and will award full compensation therefore. Farm & Grove prays for such further relief as may be appropriate in the circumstances.

/s/Edward C. Tietig

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR BREVARD COUNTY, FLORIDA

FARM & GROVE REALTY COMPANY,
Plaintiff,
v.
BREVARD COUNTY, a political subdivision of the State of Florida
Defendant
and
FARM & GROVE REALTY COMPANY,
Plaintiff,
v.
BREVARD COUNTY, et al
Defendants

Case No. 96-4509 CAD

Case No. 96-14296-CAM

_____/

MOTION FOR REHEARING

Comes Now the Plaintiff, by and through its undersigned attorney, and brings this Motion to Rehear the Order entered by the Court on April 29, 1999, and in support thereof says:

1. Said Order does not contain a specification of the facts that appear without controversy as required by Rule 1.510(d). See Florida Department of Agriculture v. Go Bungee, Inc., 678 So 2d 920 (FLA DCA 5th, 1996) and cases collected therein.
2. Said Order fails to dispose of Plaintiff's Motion to Strike the Brief of Defendant, Brevard County for violation of Guidelines B2 of Florida Guidelines for Professional

Conduct in serving its brief at the commencement of the hearing when said hearing had been set by said Defendant more than 3 months prior to that date.

3. Said Order does not include disposition of Plaintiff's Motion to abate the Motions filed by Defendant, Brevard County, based upon its failure to make discovery prior to said hearings. (Kingswood South, Inc., v. J.I. Case Credit Corporation, 623 So 2d 584 (FLA DCA 4th, 1993).

4. Said Order is contrary to the manifest weight of the evidence.

/s/
Edward C. Tietig, P.A.

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT IN
AND FOR BREVARD COUNTY, FLORIDA

FARM & GROVE REALTY COMPANY,
Plaintiff
v.
BREVARD COUNTY, a political subdivision of the State of Florida
Defendant

Case No. 96-4509

and

FARM & GROVE REALTY COMPANY,
Plaintiff,
v.
BREVARD COUNTY, et al
Defendants

Case No. 96-14296-CAM

/

MEMORANDUM OF PLAINTIFF AS TO ISSUES TO BE RESOLVED AT REHEARING

This Court's Order of April 29, 1999 left a number of issues unaddressed; while, at the same time, it created new issues. We submit the following as a suggested list of the matters to be decided by this Court upon rehearing:

1. Was the Road suit complaint affected?
2. Was the Federal condemnation action plead in Count I affected?
3. Does the holding of the City of Monterey v. Del Monte Dunes at Monterey, Ltd, 119 S Ct 1624, heretofore submitted affect the Order?

4. Does the holding of Sanchez v. Degoris, 1999 WL 314133 (Fla App 4th Dist 1999) affect Judge Moxley's Order as to the Section 1983 punitive damages count; and, thereby this Court's Order?
5. Does the Dismissal of Counts II and III now make the severance of 2 suits proper as the identity of issues is not gone?
6. The Order contained no ruling regarding Plaintiff's Motion to Strike County's brief.
7. The Order contained no ruling regarding Plaintiff's Motion to Abate for County's failure to make discovery.
8. What are findings of fact used by Court to support the Order?
9. Where is there no issue of fact which allows the Counts II and III to be dismissed?

/s/
Edward C. Tietig, P.A.

(3) Supreme Court, U.S.
FILED
No. 01 531 JUL 2001

IN THE
Supreme Court of the United States

FARM & GROVE REALTY COMPANY,
Petitioner

v.

BREVARD COUNTY, FLORIDA,
THE NATURE CONSERVANCY,
and KEVIN JUDD,
Respondents.

On Petition for Writ of Certiorari
to the Fifth District Court of Appeals
for the State of Florida

APPENDIX VOLUME II TO PETITION FOR WRIT OF CERTIORARI

Mark E. Tietig,
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IN THE CIRCUIT COURT IN THE
EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

FARM & GROVE REALTY
COMPANY, a Florida Corporation, Case No. 96-14296-CA
Plaintiff,

v.

BREVARD COUNTY, a political
subdivision of the State of Florida;
THE NATURE CONSERVANCY,
a non-profit District of Columbia
corporation, as Independent Contractor
of Brevard County and Individually;
and KEVIN JUDD, as agent of The
Conservancy and individually,
Defendants.

_____/

SECOND AMENDED COMPLAINT FOR INVERSE CONDEMNATION FOR DAMAGES

Comes Now the Plaintiff, Farm & Grove Realty Company, a Florida Corporation; by and through its undersigned attorney, and brings this Second Amended Complaint against the
Defendants: BREVARD COUNTY, (The County) a political subdivision of the State of Florida; THE NATURE CONSERVANCY, (The Conservancy) a non-profit District of Columbia corporation, as Independent Contractor of Brevard County and individually; and KEVIN JUDD, (Judd) as agent of The Conservancy and individually, and says:

1. This is an action for Inverse Condemnation of lands located in Brevard County, Florida and for damages for violation of rights and for Illegal Restraint of Trade under the

Florida Constitution and Laws, under the U.S. Constitution and Laws; and especially the Fifth and Fourteenth Amendments thereto. The amount in controversy exceeds the sum of $4,500,000.00 exclusive of interest, costs and fees.

2. Plaintiff is a Florida corporation with its sole office in Brevard County. At all times pertinent hereto it was the owner and/or trustee with sole power of sale of the lots legally described in Exhibits A-i, A-2, and A-3 (The Lots). All references to Exhibits herein shall refer to Exhibits attached to Plaintiff's First Amended Complaint.

3. Defendant Brevard County is a political subdivision of the State of Florida. Defendant, The Nature Conservancy, is a Washington D.C. corporation with an office, and doing business in Brevard County. Defendant, Judd, is a resident of Brevard County and is employed by The Conservancy as the head of its Brevard County office.

4. Plaintiff acquired these lands in 1 981 from the original developer of a 6,700 lot subdivision known as Cape Kennedy Estates. Prior to, and at the time of acquisition by Plaintiff; all of The Lots were "buildable" and freely marketable as single-family, country estates under the then-existing ordinances of The County.

5. The Lots also were duly registered and qualified since 1968 under the Federal interstate Land Sales Act and under the Florida Land Sales Act. These registrations were required in order to allow sales of more than 50 lots and were invaluable because of subsequent changes in the Florida law requiring the installation of roads prior to sale which made it economically infeasible for any new subdivision to qualify; and, certainly, made qualification economically impossible for these scattered, mostly non-contiguous lots. Additionally, Plaintiff, as a real estate broker; was licensed under Chapter 475, Florida Statutes

and was subject to those laws and duties as well. Plaintiff's principal also was a licensed attorney in Florida and subject to the standards, rules and discipline of the Florida Bar.

6. Plaintiff's personnel were experienced and skilled in real estate sales and Plaintiff had a reasonable investment-backed expectation of a profit from its business of selling these lots to prospective buyers who wished to build their homes in this rural estate setting.

7. Plaintiff started its sales efforts in July of 1 981 and continued them thereafter successfully and dominantly in this market until finally stopped because of the actions of one or more of the Defendants as alleged hereafter.

8. In 1 991, the United States Fish and Wildlife Service (USF&W), the agency of the United States government charged with the enforcement and furthering of the goals of the Endangered Species Act of 1973 (Title 16 U.S. Code, Section 1 540 et seq), gave notice to Brevard County that The County could be considered responsible for any unpermitted violations of the Act occurring within its boundaries which might endanger the species or habitat of the Scrub Jay, a species of bird determined by USF&W to be threatened.

9. Responding to this potential liability, The County examined the various options it had under the Endangered Species Act. It rejected less extensive programs and chose instead to commence a series of actions to create a county-wide Mitigation Plan. This plan would result in an exemption for all lands within the County not included within The County's mitigation area.

10. One of these actions was the scientific designation of the critical "Core" areas where the scrub jays nested as well as the "Habitat" areas surrounding the "Core" area where these birds would visit for food and other activities. All of The Lots

which are the subject of this suit fall into the essential "Core" category. See Map, Exhibit B hereto.

11. Another event imposed by this course of action was the creation of a Scrub Jay Conservation and Development Plan (The Scrub Jay Plan). A copy is attached hereto as Exhibit C. All of The Lots herein were included in the "Core" areas designated in this Plan.

12. The stated policy of The County as to landowners such as Plaintiff was to take all of the "Core" area lands without allowing for variance, appeal, exception or other administrative remedy or relief from this designation and/or taking. This policy is contained in Subsections 5.5 and 5.6. of the Scrub Jay Plan, Exhibit C. It provides:

"5.5 Iterative risk analysis and Scrub Sanctuary system selection policy

> Section 8.0 describes the process by which scrub landowners outside the core may accept a voluntary mitigation assessment or offer their property to the SCDP for purchase. Landowners within the core will not be permitted to mitigate through the SCDP. but all will be offered fair market value for their land through the SCDP." (Emphasis supplied.)

"5.6 Scrub Sanctuary system acquisition policy:

> SCDP staff will ensure that sanctuary system lands are acquired according to the Brevard County Environmentally Endangered Land Acquisition Manual and applicable sections of Chapter 125. Florida Statutes. that govern land acquisition by county governments. In particular, acquisition negotiations will be based on land values developed by qualified M.A.I. appraisers approved by the Florida Division of State Lands. At least one appraisal must be ordered for

every property proposed for purchase. Properties valued in excess of $ 500,000 must have at least two appraisals. An extraordinary vote of the BOCC is required to approve purchase prices that exceed the average of divergent appraisals. When sanctuary acquisition occurs through joint participation with other agencies (such as the CARL program), additional appraisal requirements may be observed as necessary to comply with the policies of SCDP acquisition partners." (Emphasis supplied.)

13. The County, in furtherance of this taking plan, then, on April 26, 1993, entered into a Multi-Party Acquisition Agreement for Scrub Jay Refugia with the State of Florida, Division of State Lands, Department of Environmental Protection (State) to share the cost of acquisition of lands in these areas, including all of The Lots. A copy of that Agreement (The State Agreement) is attached as Exhibit D. Plaintiff, as owner of some of the lands to be acquired thereunder, is a third party beneficiary to the policies and procedures set forth therein.

14. The County then, for the purpose of keeping the land acquisition costs at a minimum, severely curtailed development in these areas by enacting supplemental and/or amendatory ordinances pertaining to the requirement for the installation of County-approved roads as a condition precedent to obtaining a house building permit. These supplemental enactments were for the specific purpose of halting road and home construction in these "Core" areas; thereby lowering the desirability and price of the land. These enactments were:

a) to deny the use of special tax districts (MSBU) which was the standard method throughout The County for installing local paved roads. This was the

only practicable means for the installation of paved roads in these areas. The use of this MSBU ordinance was denied to these "Core" area while remaining available to landowners throughout the County (See Exhibit E).

b) to completely deny roads to most lots by restricting unpaved roads to 1,320 feet in length (See Exhibit F); and,

c) to restrict the remaining unpaved roads of less than 1,320 feet, by economic means, by refusing to provide for their funding through a uniform, fair allocation of costs such as was contained in the MSBU ordinance thereby imposing an illegal and discriminatory tax and/or impact fee. (See Exhibit G.)

15. The Scrub Jay Plan, in its final form, was approved by the experts and committee members appointed by the County to this task. But, upon in formation and belief, it was not formally adopted by The County per the cautions of the County Attorney that such an adoption would be conclusive evidence of a taking and would be used by affected landowners to seek redress. Therefore, in an attempt to avoid a formal taking, The Scrub Jay Plan was de facto adopted by The County. The County then began implementing the provisions of the Plan; especially, by the use of its scientific findings which included Plaintiff's Lots in the "Core" areas and also as to the policies and procedures of The County in acquiring the lands.

16. As the result of this scheme, and the actions to implement it as related above, Plaintiff found that from and after October 1 8, 1994, Plaintiff could not sell any of The Lots without making full disclosure to potential purchasers that the lots could not be developed as homesites.

17. The only value of these mostly 1.5 acre lots was for

development of the site or a future home. Since the sole purpose of a prospective purchaser in buying one of these lots is to be able to build and occupy a home the market was killed by these actions of The County and Plaintiff was unable to make sales of any of The Lots and was deprived of its business, and all retail value and all substantial value of The Lots.

18. At all times the valuation of the lands to be acquired and the conduct of the Defendants pertaining thereto were controlled by national appraisal standards promulgated by The Appraisal Foundation entitled "Uniform Standards of Professional Appraisal Practice", ("USPAP"). These standards were further supplemented on the state level by "Supplemental Appraisal Standards" promulgated by the Florida Bureau of Appraisal, Division of State Lands, Department of Environmental Protection. A copy of those State standards and related official position papers are attached as Exhibit H.

19. In order to implement this program of land acquisition The County determined its own personnel did not possess the necessary expertise to negotiate for and acquire the lands. Therefore, it invited proposals from various entities to become The County's acquisition entity to administer this program.

20. In response to this request, Defendant, The Conservancy, submitted its proposal. See Exhibit I. See especially examples on Page 2 thereof where it extolls its expertise in purchasing lands at prices significantly below fair market value appraisals. This was reinforced by reference, Exhibit J, which further made much of the fact that The Conservancy was dedicated to and expert in a program of not paying just compensation. Such policies and conduct are contrary to law; and, if allowed by The County to be followed, would result in Plaintiff and other landowners being paid less than Federal and State Constitutions and Laws require.

21. The County knowingly and deliberately approved of these illegal plans and policies and hired The Conservancy as an Independent Contractor for this job based, in a major part, upon this illegal scheme. See Employment Contract, Exhibit K hereto. Therefore, all of the acts complained of herein took place under color of State law pursuant to an illegal conspiracy among the Defendants.

22. Defendant, The Conservancy, hired the individual Defendant, Kevin Judd, as its employee to work with and for The County in the performance of the Employment Contract in the advancement of this illegal acquisition program. The Defendants, The County and The Conservancy, specifically selected and/or trained the Defendant, Judd, to follow and promote these illegal methods.

23. Mr. Judd is a person who is well-educated and especially trained in land appraisal practices. Mr. Judd was at all times especially knowledgeable with regard to the just compensation provisions of the laws of the United States and of Florida as well as the State and The County acquisition policies contained in The State Agreement and well knew that these laws required the landowners to be paid fair market value for their lands.

24. Despite this knowledge of the law and despite the fair market value (Just Compensation) standards promulgated by USPAP and the Florida Supplemental Standards; Judd, for The Conservancy and The County, deliberately implemented the scheme of The Conservancy and The County and embarked upon a program of manipulation and deceit of landowners for the avowed purpose of denying them Just Compensation; thereby bringing glory, achievement and advancement to himself and to The Conservancy.

25. This illegal and improper course of conduct was

heartily promoted by The Conservancy and The County; and, in fact, was a central theme of self-glorification in the quarterly self-evaluations submitted by The Conservancy to The County and heartily endorsed by Dr. Duane DeFreeze, the County employee charged with coordinating The County's efforts with The Conservancy. See Exhibit L- 1 through L-7.

26. To further this scheme, Judd counseled and schemed with The County and its licensed appraisers who were hired by The County to value these lands. As the result, the appraisals were prepared contrary to the standards of USPAP, The Florida Supplemental Standards, good appraisal practice, the requirements of The State Agreement, The County Acquisition Policy set forth in the Scrub Jay Plan, the U.S. Constitution and, especially, the Fifth and Fourteenth Amendments thereto; the Florida Constitution and; especially, Article I, Sections 2, 9, and 25 and Article X, Section 6 thereof. These improper practices are exemplified by the FEDD appraisal, Exhibit M hereto, wherein numerous third party comparable sales were ignored. Only 5 sales, all ineligible under the aforementioned standards because they were conservation sales to The County under these same "chilled" and non-open market conditions, were taken as indications of value. This improper procedure resulted in a reduced valuation of $5,203.31 per acre.

27. These actions served to reduce the just valuation to a fraction of fair market value as evidenced by other open market sales made by Plaintiff and others in this area prior to the stopping of normal sales and killing of the market by the actions of The County described above.

28. To further reduce the lot price, and to obtain an unjust "windfall" of unpaid-for acreage to The County; The Defendants then deliberately disregarded the fact that almost every sale in the area was for a "per lot" price which required

that the appraisal be based upon "per lot" sales as required under the standards cited above. Instead, Defendants conspired to pay landowners on a "net acreage" basis, excluding the road and utility right of way. This was contrary to Federal and State laws and was done despite the fact that this would be a sanctuary area with no roads or utilities. Thus, for each inside lot, they were able to obtain 5,000 square feet of land without payment, a 7.58% reduction from the Just Compensation standard. For each corner lot the uncompensated amount was over 12,600 square feet or a 19% reduction from the Just Compensation standard even if Just Compensation was paid.

29. The Defendants further reduced the value of certain of The Lots by causing the improper designation of portions of The Lots as "Wetlands". This was despite the fact that these lots were in Florida longleaf or slash pine flatwoods with saw palmetto understory; deliberately contrary to the statutory definition contained in Section 373.019(17)F.S. Defendant made this into an outright misrepresentation by the mis-labeling of the wetland delineation on the survey to read "Florida DEP Jurisdictional Wetland". This illegal practice intentionally reduced the price paid as the offering price for wetlands was $500.00 per acre.

30. The Defendants well knew, from previous purchases from Plaintiff at higher prices, that all of Plaintiff's assets were represented by lots in Cape Kennedy Estates. They also knew that the business of selling these lots was practically Plaintiff's sole business. They knew that Plaintiff owed a large mortgage upon these lots and that by reason of the above actions by Defendants, the marketability of 100% of The Lots had been lost. Defendants also knew that by these same actions, 95% of the marketability of and the market for Plaintiff's remaining inventory of other lots in the same Cape Kennedy Estates

subdivision had also been destroyed. Defendants perceived this as a further opportunity to "squeeze" down Plaintiff on the price of The Lots.

31. The Defendants well knew that Plaintiff was the largest lot owner in this area and was the logical person to first deal with. However, they knew Plaintiff's principal's legal and real estate expertise would make a large discount unlikely. Therefore, Defendants refused to deal fairly with Plaintiff and put its lands "on the bottom of the pile" deliberately prolonging this taking so that the economic forces of the large mortgage, and continuing taxes combined with no sales would push Plaintiff into a precarious economic situation.

32. The Defendants, led by Judd, completely departed from their own improper appraisals and offered only 40% of the lowest comparable sale cited by all the improperly prepared appraisals. This was a practice specifically part of The Conservancy's training of Judd and designed to bring personal and financial glory to The Conservancy and Judd in demonstrating their powers of depriving landowners of their property for less than fair market value.

33. This scheme to pay less than fair market value and all of the above described actions were approved and endorsed by The County and became its custom, policy and practice.

34. Accordingly, on or about February 26, 1996, and pursuant to this conspiracy and the agreed course of custom, policy and practice, Defendants, through Judd, offered a purchase price of $2,000 per acre for The Lots in Exhibit A- 1. This price is less than 20% of Plaintiff's prior sales prices obtained in that area and less than 40% of Defendants' own valuation as evidenced by the FEDD appraisal. Such an offer is, per Se; conclusive evidence of bad faith, fraudulent conduct and abridgment of the rights of Plaintiff.

35. Despite Plaintiff's vehement protest at this offer the Defendants did not see fit to raise this price to fair market value but set upon a course of conduct to "freeze-out" Plaintiff by keeping the properties unmarketable, thereby bringing business failure and foreclosure upon Plaintiff.

36. Plaintiff has exhausted all of its administrative remedies and performed all necessary conditions precedent to the bringing of this action and each of the Counts set forth hereafter.

Count I

Inverse Condemnation

As Against Defendant, The County

37. As the result of the acts of Defendants as set forth above, Plaintiff's private property was taken by The County for a public use.

38. As the result of the acts of Defendants as set forth above, Plaintiff lost all economically viable use of its property.

39. As the result of the acts of Defendants as set forth above, Plaintiff's property was forced to bear a disproportionate burden of an obligation of the general public.

40. As the result of the acts of Defendants as set forth above Plaintiff lost all reasonable use of its property and its reasonable investment-backed expectation of profit.

41. The Lots have been taken by The County for public use without Due Process or Just Compensation as required by the United States Constitution and; especially, the Fifth and Fourteenth Amendments thereto.

42. As the result of the acts of Defendants recited above Plaintiff's properties have been taken by The County without Due Process or Just Compensation as required by the Constitution of the State of Florida and; especially, Article I, Sections 2, 9, and 25; and Article X, Section 6.

43. Plaintiff has exhausted all of its administrative remedies and performed all necessary conditions precedent to the bringing of this action.

44. Because of these actions, the Plaintiff has been required to employ the services of the undersigned attorney and has agreed to pay a reasonable fee. The Plaintiff has further been required to pay for the costs of this suit. All of said fees and costs are recoverable, by law, from defendants.

45. Plaintiff demands trial by jury of all issues herein.

Wherefore, Plaintiff prays that this Court will enter its Order finding that Plaintiff's property has been taken by the above actions and will award a judgment against The County for Just Compensation together with interest, costs and attorneys fees.

Plaintiff further prays for such further relief as may be appropriate.

Count II

Damages Per Title 42 Section 1 983, et seq

As to All Defendants

46. Plaintiff had a federally protected right provided by the Unites States Constitution and especially the Fifth and Fourteenth Amendments thereto to Just Compensation for property taken by The County. The County had a clear and well-established duty to afford Plaintiff to provide Due Process and to pay Just Compensation for the lands of Plaintiff taken by it per the actions described herein above.

47. Plaintiff had a federally protected right as required by Federal Law; and, especially, Title 1 5 United States Code, Subsection 41 et seq to the enjoyment of its property rights which include the business of selling them. The Defendants and each of them had a duty to deal fairly with Plaintiff as to its business and as to refrain from any unfair methods of

competition; or any unconscionable, deceptive or unfair trade practices relating to their dealings with Plaintiff.

48. Plaintiff had a federally protected right to have its lands valued by federal appraisal standards promulgated by The Appraisal Foundation entitled Uniform Standards of Professional Appraisal Practice", (USPAP).

49. Despite these duties the Defendants, and each of them conspired together as described above to destroy Plaintiff's business of lot sales so as to make Plaintiff be forced to sell to The County. They further conspired to so "rig" the surveys, the wetlands determination, the acreage computation, the appraisals and the offering price as set forth above so as to force Plaintiff to sell at an illegal and inadequate price or face ruin.

50. All of these actions were taken under color of State law and in violation of Title 42 U.S.C., Section 1981 et seq.

51. As the result of Defendant's actions described above, the Plaintiff lost its right to Due Process and to Just Compensation as required by the U.S. Constitution and especially, the Fifth and Fourteenth Amendments thereto and its trade and business. Plaintiff has suffered damages as the result of the above action in an amount in excess of $ 4,500,000.00.

52. Plaintiff has exhausted its administrative remedies and performed all necessary conditions precedent to the bringing of this action.

53. Because of these actions, the Plaintiff has been required to employ the services of the undersigned attorney and has agreed to pay a reasonable fee. The Plaintiff has further been required to pay for the costs of this suit. All of said fees and costs are recoverable, by law and said statutes, from defendants.

54. Plaintiff demands trial by jury of all issues herein.

Wherefore, Plaintiff prays for damages against the Defendants and each of them, jointly and severally, together with interest, attorney's fees and the costs of this action.

Plaintiff further prays for such further relief as may be appropriate.

Count III

Damages for Conspiracy

As to All Defendants

55. As required by the Constitution of the United States and the Fifth and Fourteenth Amendments, and Constitution of the State of Florida; and, especially, Article I, Sections 2, 9, and 25 and Section X, Article 6; the policies set forth in Articles 5.5 and 5.6 of the Scrub Jay Plan; the appraisal and valuation requirements specified in The State Agreement and in the Policy, and Page iii of the Florida Supplemental Appraisal Standards; The County had a clear and well-established duty to pay Just Compensation for The Lots of Plaintiff, whether taken or purchased.

56. As required by Federal Law; and, especially, Title 1 5 U.S. Code § 41 et seq, The Defendants and each of them, had a duty to deal fairly with Plaintiff as to its business and as to refrain from any unfair methods of competition; or any unconscionable, deceptive or unfair trade practices relating to their dealings with Plaintiff.

57. As required by Florida law; and especially, Chapter 501.201, The Defendants and each of them, had a duty to deal fairly with Plaintiff as to its business and as to refrain from any unfair methods of competition; or any unconscionable, deceptive or unfair trade practices relating to their dealings with Plaintiff.

58. At all times the valuation of the lands and the conduct of the Defendants pertaining thereto was controlled by federal appraisal standards promulgated by The Appraisal Foundation

entitled Uniform Standards of Professional Appraisal Practice (USPAP). These standards were further supplemented by Supplemental Appraisal Standards promulgated by the Florida Bureau of Appraisal, Division of State Lands, Department of Environmental Protection.

59. Despite these duties the Defendants, and each of them conspired together to destroy Plaintiff's business of lot sales so as to force Plaintiff to sell The Lots to The County at a lesser, illegal and inadequate price. They further conspired to so "rig" the surveys, the wetlands determination, the acreage computation, the appraisals and the offering price, all as specified above, so as to force Plaintiff to sell at an inadequate price or face ruin.

60. As the result the Plaintiff lost its right to Due Process and to Just Compensation as required by the U.S. Constitution and especially, the Fifth and Fourteenth Amendments thereto The Constitution of the State of Florida; and, especially, Article I, Sections 2 9, and 25 and Section X, Article 6; the policies set forth in Articles 5.5 and 5.6 of the Scrub Jay Plan; and its trade and business Plaintiff has suffered damages as the result of the above action in an amount in excess of $4,500,000.00.

61. Plaintiff has exhausted its administrative remedies and performed all necessary conditions precedent to the brining of this action.

62. Because of these actions, the Plaintiff has been required to employ the services of the undersigned attorney and has agreed to pay a reasonable fee. The Plaintiff has further been required to pay for the costs of this suit. All of said fees and costs are recoverable, by law and by said statutes, from Defendants.

63. Plaintiff demands trial by jury of all issues herein.

Wherefore, Plaintiff prays for damages against the Defendants and each of them, jointly and severally, together with interest, attorney's fees and the costs of this action.

Plaintiff further prays for such further relief as may be appropriate.

Count IV

Illegal Monopoly and Restraint of Trade

As to All Defendants

64. The actions, in concert, of the Defendants pursuant to the conspiracy set forth above, were intended to and did eliminate all interest of the public in purchasing lots from Plaintiff. This was Plaintiff's business and it was ruined by such actions.

65. The Defendants by these acts killed the sales market as to area encompassing Plaintiff's Lots. Defendants well know that as the result thereof, the trade and commerce of Plaintiff would be destroyed thereby enabling Defendants to buy The Lots at a fraction of their value. As the result thereof, the trade as to the sale of The Lots was restrained to the point of market destruction and Plaintiff faces economic ruin.

66. Plaintiff has suffered damage as the result there of in an amount in excess of $ 4,500,000.00

67. Such acts are in violation of Sections 542.18 and 542.19, F.S. The injuries suffered were of the type meant to be protected thereby and were the direct result of acts of the Defendants proscribed by said statutes.

68. Plaintiff is entitled to treble damages pursuant to Section 542.22, F.S. against the Defendants, The Conservancy and Judd, jointly and severally. Plaintiff is further entitled to equitable relief against The County pursuant to Sections 542.21, 542.22, and 542.23, F.S.

69. Because of these actions, the Plaintiff has been required to employ the services of the undersigned attorney and has agreed to

pay a reasonable fee. The Plaintiff has further been required to pay for the costs of this suit. All of said fees and costs are recoverable, by law and said statutes, from Defendants.

70. Plaintiff demands trial by jury of all issues herein.

Wherefore, Plaintiff prays that this Court will enter its Order finding:

1. That the Defendants, and each of them, have embarked upon a course of conduct which violates the aforesaid statutes;

2. Award a civil penalty per Section 542.21 F.S. against Judd of $ 100,000.00;

3. Award a civil penalty per Section 542.21 F.S. against The Conservancy of $ 1,000,000.00;

4. Award treble damages per Section 542.22 F.S. against Judd and The Conservancy in an amount in excess of $ 13,500,000.00;

5. Enjoin County from continuing these illegal acts;

6. Award Court costs, attorneys fees and interest as provided by laws and said statutes; and

7. Award such other damage or relief as may be appropriate in the circumstances.

/s/_____

Edward C. Tietig, P.A.

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR BREVARD COUNTY, FLORIDA

FARM & GROVE REALTY COMPANY — Case No. 96-4509 CAD

Plaintiff,

v

BREVARD COUNTY, a political subdivision of the State of Florida

Defendant

and

FARM & GROVE REALTY COMPANY — Case No. 96-14296 CAM

Plaintiff

v

BREVARD COUNTY, et al

Defendants.

_____/

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

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I. Statement of The Case

This suit seeks redress for three wrongs:

1. The County should pay Just Compensation to Farm & Grove for its taking of some 242 lots located in the Valkaria and Ten Mile Ridge Refugia areas created by the County for county-wide conservation requirements for scrub jay "core" nesting areas.
2. All Defendants should pay damages for a variety of "dirty tricks" in conspiring to secure the land of Farm & Grove at far less than fair market value.
3. All Defendants should pay damages for ruining Plaintiff's entire real estate lot sales business in an attempt to force Plaintiff to agree to a below-market price for the 242 lots.

II. Background

ALL OF THIS IS DISPLAYED AT LENGTH IN THE SWORN COMPLAINT AND IN THE PROFFER OF EVIDENCE. BOTH THOSE PLEADINGS ARE FOOTNOTED TO THE EXACT REFERENCE.

In 1968, Mr. N. R. Field, through his corporations, Atlantic Ridge Corporation and Cape Kennedy Estates, Inc. created approximately 6,700, 1.5 to 2.0 acre lots on his land holdings in the Malabar/Valkaria/Grant area of south Brevard County. He named it Cape Kennedy Estates.

All regulations of Brevard County and the requirements of the State of Florida Land Sales Act and of the federal Interstate Land Sales Act (HUD) were met. Roadways to service each lot were dedicated of record to the Grant Drainage District for the benefit of the public. The sales program was successful and all 6,700 lots were sold by early 1972 for a total sell-out price of over $33,000,000.00. These individual sales resulted in small acreage tracts suitable only for single-family residential use. Since all sales were out of state, the area was fractured into small holdings of non-residents.

In 1979, Edward "Buzz" Tietig, the owner and broker of record of Farm & Grove Realty Company, negotiated with Mr. Field's heirs to acquire some 1,350 randomly scattered lots which had reverted to the seller upon purchasers' defaults. Mr. Tietig was a businessman and an attorney well-experienced in this land sales field and could appreciate the fact that not only were the governmental registrations of irreplaceable value; but, also, that the area had so developed that besides the regular land sales markets, a substantial local "move-up" market from Palm Bay existed. Under these laws and regulations Farm & Grove could sell tracts of land without any physical improvement or any contractual or legal requirement or promise other than good title.

Farm & Grove provided a full warranty deed plus title insurance so it exceeded all legal requirements.

To secure the parcels involved a financial commitment of over $800,000.00. In addition, over $120,000.00 in sales and administrative costs had to be met. Mr. Tietig had his company undertake these obligations with the expectation of a $13,500,000.00 or better sell-out.

After months of delays in obtaining the re-activation of the registrations and licenses, Farm & Grove started its sales on July 4, 1981. The opening was a resounding success and within 60 days the public records showed 66 sales totaling over $665,000.00.

At the start of sales there was no governmental impediment to obtaining individual building permits nor were there any private deed restrictions. The AU zoning law for the County changed in 1973 to require 2.5 acres per house, but all of these lots were exempted by the "grandfather clause" of that ordinance that excluded prior sales of smaller parcels. Therefore, the lots were not only useable but became even more valuable. In 1980, the County commenced requiring that roadways be large enough for emergency vehicles, but that caused no problem.

Over the years the area progressed steadily; partially in the Town of Malabar (as RR zoning) and the majority in the County (as AU). The average value of homes increased so that today the average value is well over $175,000.00. The number of houses in the general area increased from about 55 in 1970 to about 1,600 homes today.

The fortunes of Farm & Grove also increased. Its sales to October 1, 1994, the alleged date of taking, totaled 603 lots with a total sales value of over $7,600,000.00. This performance met or surpassed the original economic analysis and expectations.

The only issue which had affected the business in years

prior to 1994 was the stiffening of the road ordinances by the County in areas where the roadways were not county-dedicated to require both paved and unpaved roads be built to DOT standards.

Since Mr. Tietig's family, as the largest landowners within the Grant Drainage District, controlled its board, an ordinance to allow road building while meeting these new requirements was passed. The County Commission then prevailed upon the Legislature to abolish the Grant Drainage District. This was done in 1988; however, by the law enacted, the road dedications were transferred to the County. This transfer of the road dedications eliminated the prior discrimination between county dedicated and non-county dedicated roads and prospective homebuilders had the right to install paved roads under the County's MSBU ordinance.

During this same era the County had created its Comprehensive Development Plan. The Cape Kennedy Estates area created a very minor impact and was well below the problem level in each aspect of the Plan.

In 1992 the County became aware of the necessity to take action to comply with the federal Endangered Species Act as it pertained to the scrub jay.

It could have taken a minimal passive steps, as did Indian River County and certain other counties, by merely requiring all building permit applicants first comply with U.S. Fish & Wildlife regulations. Instead, the Commission created an ad hoc committee to devise a plan to acquire control of the whole process. This committee produced a moderate plan but the plan did not transfer ownership and control of the areas to the County. Therefore, the County rejected the proposed plan and created a new Scrub Jay Committee to produce a plan with full land ownership and control resting in the control of its

Commission.

The Scrub Jay Committee did produce such a plan. However, it recognized that development within the "Core" nesting areas was incompatible with the conservation goal. It recognized that the plan had taken away the Core-area landowner rights to develop and so the Final Plan provided for fair market value compensation for all owners of Core lots.

The County Commission liked the Final Plan but was faced with a dilemma:

1. If it adopted the plan, the County immediately become liable for millions of dollars in takings claims at fair market value; or
2. Abandon the plan and lose the power and control over the land; or
3. Do the plan with EELS money only, but face development and price rises as the area evolved.

The Commission found another course and that is the crux of this suit. It decided that by not adopting the plan– formally, but proceeding with it under the cloak of the EELS program not only could it avoid immediate funding; but it also adopted a "willing buyer/willing seller" fiction and attempted to avoid the constitutional requirement of full, just compensation required by a taking.

The Commissioners were still faced with the spectre of more development and higher prices. This was brought to their immediate attention by the application for a paved MSBU road by Nations Land Company which would open up an area of the Valkaria Core next to the Habitat Golf Course. They plugged that loop hole with a beautiful Catch-22 maneuver. The building code already prohibited the issuance of a building permit unless the lot was serviced by a county-approved and maintained road. The Commission now "changed its policy" by a formal

Resolution dated October 14, 1998 to take away the availability of the MSBU in areas "where no development existed". So, without streets, no home/without a home, no streets. This affected not only the Core areas, but all Cape Kennedy Estates area, including all of Farm & Grove's holdings.

That decision was fiercely opposed by Farm & Grove and Mr. Tietig, but was passed. Thereafter there was no path open to landowners in Cape Kennedy Estates legally permissible and economically feasible to use the lots. There was no other feasible use of the property.

This regulatory scheme enacted by the County shut down the ability of owners to use the lots, all avenues of relief had been exhausted and the lots of Farm & Grove, not only in the Core areas; but, also, all lots in the Cape Kennedy Estates subdivision were fatally affected and could not be legally or ethically sold. The appraisals obtained by the County after this event confirm that without the MSBU ordinance, development of roads to Plaintiff's lots in Cape Kennedy Estates is not feasible.

Not only did this action of the Commission stop development but it also took the pressure off the County to acquire the lots speedily. Instead, the County, as the sole customer left, could adopt a "take it or leave it" attitude and offer far less than market value, content that no other competition existed either to buy or to build. Farm & Grove found that only 3% of its 700±unsold lots (about 21 lots) could be made buildable and saleable to meet both legal and market requirements. Its total sales of non-road lots after October 1, 1994 to date in this artificially depressed and restricted market are only 23, or less than 6 per year.

Farm & Grove was forced to go into unpaved road development in a few areas where its lots could absorb 100% of the road cost, so as to be able to deliver a lot it could ethically

sell. The County then countered this move by amending its regulations and criteria so as to delay the issuance of road building permits. It also created and imposed new engineering criteria applied solely to these applications which made road construction unfeasible.

To further its plan the Commission needed a real estate acquisition expertise at below market rates and, therefore, sought an outside acquisition agent which would embrace this below market value scheme. In The Nature Conservancy they found a willing partner. TNC bragged of its ability to extract land from owners at less than fair market value. TNC had prior activities in other counties in Florida and used them as references to confirm to the Commission it was willing to engage in this below market program. Its training of its Brevard Manager, Kevin Judd, reflected this attitude. To paraphrase John Pescatello, the attorney/agent of TNC who personally trained Mr. Judd, "we'll take it all at 40¢ on the dollar".

To prove the value of their services exceeded its $167,000.00 per year fee, TNC conspired with, instructed and trained Mr. Judd and the County officers and employees working with Mr. Judd to create a series of steps to depress prices further:

1. They instructed the appraisers to disregard hundreds of open market sales for use as comparables; and, instead, use only mitigation sales to the County. In this boot-strap manner they used their own discounted purchases to prove the market.
2. They instructed their appraisers to use non-arms length sales to create a "bulk-sale-discount-factor" to justify the "40¢ on the dollar" offers.
3. They pressured individual sellers with threats of "one-time only" offers.

4. They pressured individual sellers by stating or implying that the acquisition funds were limited and would not be replenished.
5. They offered only $500.00 per acre for wetlands, then instructed their environmental surveyors not to use the Florida official wetlands definition. In this manner all piney woods and palmetto areas would be considered wetlands and paid for at the lower rate.
6. They instructed the appraisers to value the property on a per acre basis rather than the per lot sales history used in the market for the past 25 years. They then instructed their land surveyors to compute the lot acreage net of any paper road easements. This two-step scheme allowed them to shrink the per lot price 8% to 20%.
7. They used low-ball tactics to prolong negotiations with landholders who had business or personal pressures, including signing letters of interest at agreed prices, then dropped the price to 40¢ on the dollar after the owner had agreed to sell.
8. They deliberately stopped negotiations with landowners in financial trouble until the landowner would either sell at the lower figure or TNC would purchase through a negotiated purchase price with the foreclosing mortgagee.
9. They increased the hardship on Plaintiff by delaying its unpaved road permit applications for over two years while granting other applicants in the same area permits in as few as 37 days.
10. They arbitrarily changed the engineering standards on unpaved roads to make them both

economically unfeasible and unmarketable because of excessive elevations and configurations.

11. They created fictions of "special conditions" in the Cape Kennedy Estates area to justify enactment by ordinance of criteria much more severe than other areas of the county.
12. They cut down all of the large trees on lands previously purchased in the Core areas so as to destroy the desirability of the area.
13. They blocked and/or locked public access over dedicated rights of way to Core areas so that the Valkaria Core landowners could not access their own lands.
14. They created "controlled" burn programs which would surround and threaten all lots in the Core areas, thereby destroying all desirability for residential use.

As the result of these actions Farm & Grove sales have vanished, its mortgage and tax debt increased and its previously met economic expectations were shattered.

III. Relief Requested

Plaintiff seeks:

1. Constitutional just compensation for the 242 lots taken. This includes fair market value for the lots, interest from date of taking, court costs and attorney's fees.
2. Damage to Plaintiff's business of lot sales by making the lots impossible to develop and, accordingly, illegal and/or infeasible to sell to the public.
3. Damages for the conspiracy denying Plaintiff its US and Florida constitutional rights.
4. Injunctive relief so that Plaintiff does not face

arbitrary and capricious rules or bear an unconstitutionally unfair burdens of cost in the installation of roads.

Plaintiff has requested a trial by jury of all matters properly triable by jury.

IV. Response to Motion of TNC and Judd

We will attempt to respond in the same order as the allegations appear in the Motions (Paraphrased). However, we first request you read the cases collected in the separate appendix. They show the law applied to very similar facts.

Farm & Grove is a real estate investor/speculator.(M-1). Does Publix speculate in cans of tomato soup and Jim Rathmann speculate in Chevrolets? Farm & Grove is a duly licensed business and has done business in Brevard County for 18 years. It has, of public record, more than 600 sales of Cape Kennedy Estates lots prior to the actions of the Defendants. Price and terms also are of public record.

Farm & Grove has always been subject to the Endangered Species Act.(M-2) So what? Everyone in America is subject to the Act. It is the acts of the Defendants that defined Plaintiff's lands as part of the area chosen by Defendants to be Defendants' undevelopable Core conservation area and the illegal methods attempted by Defendants to gain control of these lands without just compensation that started this suit.

Brevard County never enacted, formally, informally or otherwise . . . the Scrub Jay Program. (M-3) That is the whole crux of this suit — the de facto program of the County assisted by TNC and Judd — the regulatory scheme to freeze sales and reduce prices — the unethical and illegal methods used by TNC and Judd to gull the landowners. All of this is detailed in the exhibits to the Complaint, in the Depositions filed and, especially, in the Offer of Proof in support of the Punitive Damages amendment. This is a

factual argument that destroys any Summary Judgment Motion.

The EELS plan is a will buyer/willing seller program and in no way prohibits or regulates the development of property. (M-3) That is a factual argument. It is wrong. The Act gives the State of Florida the power of eminent domain (Proffer-2). That power has been used 50 times for 2,088 acres. That is not a willing seller program.

The effect of the EELS program or any other aspect of the Defendants' actions upon the real estate market for these lots is an issue of fact. See Affidavits of Judy Fox, as to the drop in sales. See Affidavits of Jason Steele and Robert Leichtenberg as to the detractive effect of all these regulations and programs upon the public market for these lots.

See the minutes of the EELS Committee, itself, as to the requirement of dealing at "fair market value".

TNC came into the picture well after the land was described as environmentally sensitive. Neither TNC or Judd played any policy-making role in identifying the land targeted for acquisition. (M-3) Again, so what. If a bank robber had no part in selecting the bank to be robbed he is still guilty of participating in the crime. However, that is not a true factual allegation. The depositions of Barr, Townsend and Pfeffer shows that an agent of TNC, was in the County during the policy formation and actively participated therein.

TNC and Judd did not hire or contract with the appraiser. (M-3) Those are words on a legal tight-rope. They are literally true as the County "hired and contracted with" all of the appraisers, surveyors, conservationists and the like. But, who told the County that appraisals were needed? The degree of influence, directly and indirectly, upon the appraisers selected and the work product is a factual jury question. For example, Judd admits he corrected the wetlands definition problem when brought to his attention. TNC

was required, by contract, to be sure that all procedures met Florida standards by the terms of its contract with the County. See also Affidavit of Robert Leichtenberg. The degree of influence is a factual matter.

Contrary to allegations no agreement to rig wetlands determination. (M-3) Again, a factual issue. TNC and Judd were required by the contract with the County to be sure that laws were observed, especially those in the contract between the County and Florida DEP. That these laws weren't observed is admitted. That Judd was active in securing the original survey and then later had the delineation revised is admitted. We are arguing "he said — she said". That is a factual dispute. It is improper for this Motion.

Nations Land Company has made mitigation sales at $5,000 per acre. (M-4) This only proves Plaintiff's contention that these Core areas are known by all to be approved conservation lands and desired by the County for that use. The very acts complained of have funneled control of the quantity of purchase and the price into the Defendant's hands. Defendants' cannot create a situation and then say the resulting conditions reflect an "open market". The fact that these few sales were made only proves a program is going forth to acquire all Core lands. What TNC did not tell the Court is that these lands wind up in the control of the same County and DEP. Again, a factual distortion.

The EELS program doesn't, per se, prohibit development provided landowners comply with Federal and State requirements. (M-4) Another carefully crafted statement. It carefully does not include County Requirements. But, even if it doesn't, per se, prohibit development, so what? It was the combination of requirements and regulations, and, especially, the building and road ordinances of the County which pushed past ordinary police powers and, instead, ruined use and saleability of the property and effected a taking.

The lands of Plaintiff are non-contiguous, vacant and unimproved and located in a largely undeveloped area.(M-4) So what? There was a market. Sales were good. Then the acts of Defendants destroyed the market and sales.

Plaintiff has been restricted at all times from advertising the property as building lots. (M-5) So what? The parcels had been previously registered an unimproved tracts and this requirement was continued as to advertising copy. It did not prohibit the lots from being used as home sites. The building of over 1,500 homes in the area is good proof of usability. It is also proof of desirability.

They are not accessible by road and are subject to surface water. (M-5) This is a quote from the Offering Statement. It was there for the original sales program in 1968. All lots have dedicated rights of way for road, utility and drainage purposes. It is admitted the roads are not physically installed. This is the self-imposed condition the County seized upon to halt all developed and, thereby, kill all sales.

As to the surface water, that is a quote from the Offering Statement in effect since 1968 and which statement is preceded by "10% of the land is". That is a deliberate misquote.

The lots are subject to US F & W permitting requirements. (M-5) That is admitted. That is not a pertinent fact. It is not what stopped road development. It has not stopped construction where roads are installed. It is the County's designation of a non-mitigated Core area and its stopping road development that have affected the destruction of the private market.

County Ordinances haven't really changed. (M-5) The effect of the ordinances upon sales, the requirements of disclosure and fraud are all questions of fact. There has been an effect. See Affidavits of Steele, Leichtenberg and Fox. This is a fact-driven question.

MSBU funding for roads was once available in the Cape

Kennedy Estate area, but no longer except as per Ordinance 91-08. (M-6) That is a crucial admission by Defendants. It admits that it was once available. It admits it is no longer available. Now the remaining facts show this helped kill Plaintiff's business.

Since the suit was filed, Plaintiff has sold lots for mitigation purposes. (M-6) So what? The County accuses Farm & Grove of failure to mitigate. The fact that sales were made to keep the company going does not affect the validity of the claims. It only points up the economic pressure on Plaintiff which forced it to sell below market.

Plaintiff never applied for a paved MSBU. (M-6) So what? Plaintiff's business was selling lots from 1981 until 1994 when that business frustrated by the actions of Defendants.

Plaintiff has applied for and been granted an unpaved MSBU. (M-6) Not true, see Affidavit of Judy Fox. Another fact dispute.

Since this case started Plaintiff has applied for a number of unpaved road permits which have not been finally enacted upon by the County. True, Farm & Grove has taken all feasible business avenues which will allow it to survive. The fact that TNC admits the permits have not been issued after more than 2 years in processing only proves Plaintiff's case. The balance of TNC's Motion is legal argument. It is answered in our Memorandum Brief.

V. A. Response to Defendant, Brevard County's Amended Motion for Summary Judgment

The 16 paragraphs of County's Motion are unsupported by any factual particularity or by the citation of any legal authority. Rule 1.510 "requires a movant for summary judgment to state with particularity in its motion the grounds upon which the motion is based and the substantial matters of law to be argued. The obvious purpose of this rule is to eliminate surprise and to provide the parties a full and fair opportunity to argue the issues." Lee v.

Treasure Island Marina, Inc., 620 So. 2d 1295, 1297 (Fla 1st DCA 1993). Obviously, this was done so as to "sandbag" the Plaintiff at time of hearing. The County has moved for Summary Judgment, while at the same time it has actively denied the discovery attempts.

It states "the actions don't constitute policy" -- a purely factual statement. While at the same time it was successful in its Motion for Protective Order to deny Plaintiff the right to depose each of the Commissioners.

It has further delayed, misanswered and non-answered a substantial number of Interrogatories. See Motion to Compel Discovery, copy attached.

A party may not benefit by its own misdeeds. Its Motions should be deemed or at least delayed until this discovery is complete. See Kingswood south, Inc. v J I. Case Credit Corp, 623 So 2d 584 (FLA 4th DCA, 1993), copy attached.

Nonetheless we answer in our Memorandum using the corresponding paragraph numbering of the Motion. We also comment to certain paragraphs as follows:

Paragraph 4. The County argues that Plaintiff's investment-backed expectations did not include 1.5 acre residential lots. It then goes on to detail the factual basis for this assertion.

That is surely a factual dispute. It is well controverted by over 600 sales. It is well controverted by the Proffer of evidence and by the Affidavits of Steele, Leichtenberg and Fox filed in contravention of this Motion. Common sense shows the assertion in Paragraph 4 are not only argumentative but also false.

Paragraph 10. The denial that the actions do not constitute policy is pure argument. It completely begs the question of what the policy was. It has been well pled and confirmed by Mr. Pfeffer in his deposition. It was stated by Commissioner O'Brien and contained in this Proffer. The County has not denied that in any manner the "policy change" which took away the use of the MSBU

was initiated and passed by the County Commission (See Complaint Exhibit E). That is certainly the policy of the County.

Paragraph 11. This ground was raised previously by Motion to Dismiss and denied by Judge Richardson. See Paragraphs II G and H in Order of October 20, 1997, copy attached.

Paragraph 12. This ground was raised previously by Motion to Dismiss and denied by Judge Richardson. See Paragraph 1 D in Order of October 20, 1997. Also see Memorandum.

Paragraph 14. This is pure argument. A de facto adoption is alleged. It is supported by the State Contract, the TNC contract, the CARLS applications, the acquisition program that has purchased dozens of parcels and hundreds of acres. It is admitted by Mr. Pfeffer in his deposition.

Paragraph 15. This, again, is pure argument. The County can't blame another for a program the Commission voluntarily adopted. The Commission could have elected to do nothing but have permit applicants first secure a USF& W permit.

A constitutional right cannot be taken away by any statute or regulation.

V. B. Response to Motion of the County for Attorneys Fees

Attorney fees for Defendant County would be inappropriate because a solid basis exists to form a colorable claim under all counts in Plaintiff's Complaint. The County is not entitled to attorney fees because of the high standards that militate against granting attorney fees to prevailing defendants under 42 U.S.C. § 1988. The standard is so stringent that the plaintiff's action must be "meritless in the sense that it is groundless or without foundation" in order for an award of fees to be justified. Busby v. City of Orlando, 931 F.2d 764, 787 (11th Cir. 1991). As the Supreme Court held in the context of denying S 1988 fees to prevailing defendant in a S 1983 action:

> The plaintiff's action must be meritless in the sense that it is groundless or without foundation. The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees. As we stated in Christiansburg: 'To take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII. Hence, a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.'

Hughes v. Rowe, 449 U.S. 5, 14-15 (1980) (citing Christiansburg Garment Co. v. E.E.O.C., 434 U.S., 412, 422 (1978)).Here, Here, Plaintiff's claims are well grounded and made in objective (and subjective) good faith. The claims have been tested and tempered under the fire of prior motions to dismiss. See Jeffries v. City of Chicago, 540 F. Supp. 1371 (N.D. Ill. 1982) (holding that defendants' participation in the activity forming basis of lawsuit provided plaintiff with a sufficient rational basis for naming them in the complaint and pursuing discovery to determine whether they participated in the violation of plaintiff's rights, thereby precluding the award of costs and attorney fees to defendants prevailing on motion for summary judgment). Here, Plaintiff has more than a rational basis for his claims against Defendants. Here, Plaintiff has at least some factual basis to support each and every one of its allegations, and to counter each of Defendants' defenses. Therefore, for this and all the foregoing reasons, attorney fees should not be awarded to Defendant County.

VI A. Brief of Law

Standard for Summary Judgment

The standard for adjudication on a motion for summary judgment requires that Defendant's motion in this case be denied. The Rule states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Rule 1.510(C), Fla. R. Civ. P. "The strict procedural requirements for summary judgment motions contained in Florida Rule of Civil Procedure 1.510 are designed to protect a litigant's constitutional right to a trial on the merits of a particular claim." Bush v. State Farm Fire & Cas. Co., 711 So. 2d 68, 69 (Fla. 2d DCA 1998). The granting of a summary judgment, in most instances, brings a sudden and drastic conclusion to a lawsuit, thus foreclosing the litigant from the benefit of and right to a trial on the merits of his or her claim. Coastal Caribbean Corp. v. Rawlings, 361 So. 2d 719, 721 (Fla. 4th DCA 1978). It is for this very reason that caution must be exercised in the granting of summary judgment, and the procedural strictures inherent in the Florida Rules of Civil Procedure governing summary judgment must be observed. Page v. Staley, 226 So. 2d 129, 132 (Fla. 4th DCA 1969). "The procedural strictures are designed to protect the constitutional right of the litigant to a trial on the merits of his or her claim. They are not merely procedural niceties nor technicalities." Bifulco v. State Farm Mutual Automobile Ins. Co., 693 So. 2d 707, 709 (Fla. 4th DCA 1997).

Rule 1.510 "requires a movant for summary judgment to state with particularity in its motion the grounds upon which the

motion is based and the substantial matters of law to be argued. The obvious purpose of this rule is to eliminate surprise and to provide the parties a full and fair opportunity to argue the issues." Lee v. Treasure Island Marina, Inc., 620 So. 2d 1295, 1297 (Fla 1st DCA 1993). "The purpose of a summary judgment proceeding is to determine the existence or absence of material issues of fact and is not designed as a trial by affidavit or deposition." McCauley v. Eastern Steamship Lines, Inc., 211 So. 2d 72, 74 (Fla. 4th DCA 1968) (footnote omitted). "It is well settled that summary judgment may not be the vehicle for disposition of conflicting issues based upon colliding material claims and counterclaims that are supported on the one hand and opposed on the other day by depositions and affidavits." Martin v. Clyde Knowles General Contractors, Inc., 327 So. 2d 865, 866 (Fla. 1st DCA 1976). A summary judgment proceeding "is not designed to conduct a trial of the issues drawn. All evidence must be viewed in the light most favorable to the party against whom the motion is made, and if there is a genuine issue of material fact, then the motion should be denied." Weinstein v. General Accident Fire and Life Assurance Co. Ltd., 141 So. 2d 318, 321 (Fla. 1st DCA 1962) (footnote omitted). "It was never intended by this rule that cases should be tried by affidavit or that affidavits, interrogatories or depositions or similar evidence, could be used as substitutes for a jury trial. To sum it all up, if there are issues of fact and the slightest doubt remains, a summary judgment cannot be granted." Gordon v. Hotel Seville, Inc., 105 So. 2d 175, 178 (Fla. 3d DCA 1958), cert. denied, 109 So. 2d 767.

"When acting upon a motion for summary judgment, if the record raises the slightest doubt that material issues could be present, that doubt must be resolved against the movant and the motion for summary judgment must be denied." Jones v. Directors Guild of America, Inc., 584 So. 2d 1057, 1059 (Fla. 1st DCA

1991).

A trial court is precluded from granting summary judgment if the evidence is conflicting or if "inferences reasonably deducible from the evidence cast doubt" on a material issue. Lane v. Talloni, 626 So. 2d 316, 317 (Fla. 5th DCA 1993). "Even if there is no conflict in the evidence, a motion for summary judgment should be denied where inferences reasonably deducible from the evidence cast doubt on the issue." 4444 Corporation v. City of Orlando, 598 So. 2d 287, 288 (Fla. 5th DCA 1992). "A court which draws its own inference from among the lawful inferences, and enters a summary judgment based thereon, deprives the parties of their right to a trial by a jury contrary to the purpose and intent of the rule governing summary judgments." Register v. Redding, 126 So. 2d 289, 291 (Fla. 1st DCA 1961). The burden, furthermore, is on the movant to demonstrate conclusively that the nonmoving party cannot prevail. Gomes v. Stevens, 548 So. 2d 1163 (Fla. 2d DCA 1989). "If the record reflects the existence of any genuine issue of material fact, or the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist, summary judgment should not be granted." Wilson v. Woodward, 602 So. 2d 547, 549 (Fla. 2nd DCA 1992).

Here, as argued in detail in the foregoing sections, Defendant cannot meet this burden and show that no material facts remain undisputed and that the issues can be resolved purely as a matter of law. Therefore, Defendants' Motions For Summary Judgment must be denied.

VI B. Brief of Law

Regulatory Takings, Inverse Condemnation

The best starting place for the law of regulatory taking or inverse condemnation starts with Pennsylvania Coal Company v Mahon, 260 US 393 (1922). There Justice Holmes stated: "The general rule at least is that while property may be regulated to a

certain extent, if regulation goes too far it will be recognized as a taking."

Armstrong v US, 364 US 4 (1960) held that the Fifth Amendment was: ". . . designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole."

In Penn Central Transportation Co v City of New York, 438 US 104 (1978), a 3-pronged test of a taking was established:

(1) the economic impact of the regulation on the claimant;

(2) the extent to which the regulation has interfered with distinct, investment-backed expectations; and

(3) the character of the government action.

Lucas v So Carolina Coastal Council, 505 US 2003 (1992), held that the Taking Clause of the Fifth Amendment could be violated by direct government appropriation of property without just compensation or by government regulation which interferes with the owners use of the property to the extent that it accomplishes nearly the same result.

It also held that a partial taking is compensable.

Dolan v City of Tigard, 512 US 374 (1994) then required a two-step test for the validity of a regulation that:

(a) there must be an "essential nexus" between the legitimate state interest and the permit condition, and

(b) there must then be a "rough proportionality" between the condition enacted and the impact of the proposed development.

In 1997, Suitum v Tahoe Regional Planning Agency, 520 US 725 (1997), all questions of ripeness were resolved in favor of the landowner without necessity for futile acts.

In 1998, Eastern Enterprises v Apfel, 524 US 498

(1998), confirmed this line of cases and found a constitutional taking when a severe, disproportionate and extremely retroactive burden had been imposed.

We also have facts such as denial of access, "controlled" burns, clear cut lumbering and all-pervasive publicity which have rendered the lots unfit for any use.

As said by the Supreme Court, Loretto v Telepromptions Manhattan CATV Corp, 458 US 419 (1980) states:

> ". . . we have long considered a physical intrusion by government to be a property restriction of an usually serious nature for purposes of the Takings Claus. Our cases further establish that when the physical intrusion reaches the extreme form of permanent physical occupation, a taking as occurred."

Quoting United States v Causby, 328 US 256 (1946) that frequent flights immediately above a landowner's property constituted a taking:

> "If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it."

VI C. Brief of Law

Indispensable Parties

Despite Brevard County's unsupported affirmative defense, the United States Fish & Wildlife Service and the Department of Natural Resources of the State of Florida are not indispensable parties to this action. The Defendant has the burden of proving its affirmative defenses. Captains Table, Inc. v. Khouri, 208 So. 2d 677 (Fla. 4th DCA 1968); Hough v. Menses, 95 So. 2d 410 (Fla. 1957).. An indispensable party is defined as "a person with such an interest in the subject matter of

the action that a final adjudication cannot be made without affecting his interests or without leaving the controversy in such a situation that its final resolution may be inequitable." City of Riviera Beach v. Bjorklund, 563 So. 2d 1114, 1115 (Fla. 4th DCA 1990). Here, Defendant Brevard County does not prove that a judgment against Defendant Brevard County and/or the other defendants would not be inequitable, as such a result would in no way adversely affect the State of Florida or the United States. There is no evidence that the interests of the State of Florida or the United States would be harmed if Plaintiff prevails and just compensation is paid. See Spierer v. City of North Miami Beach, 560 So. 2d 1198, 1200 (Fla. 3rd DCA 1990) (holding that while agency has extensive regulatory authority over defendant, the record does not reflect whether the agency has taken regulatory action with respect to plaintiff's immediate interests, nor does it reflect whether the agency's substantial interests would be affected in such a way as to render the agency an indispensable party); W.R. Cooper, Inc., v. City of Miami Beach, 512 So. 2d 324, 326 (Fla. 3rd DCA 1987) (holding that the determination of damages and a judgment for their recovery would have constituted the full relief sought by plaintiff and would have affected the rights of no other parties, even if Secretary of Labor, the other party, is subject to suit in subsequent related actions). Here, insofar as their programs are related to the State of Florida or the United States governments, Defendants have an opportunity to craft and implement their programs in a lawful, fair, and just manner. No evidence exists that when the relevant state and federal programs are implemented precisely as intended by the state and/or federal governments, that the programs would result in an unconstitutional taking of plaintiffs' property. See Adolph v. Federal Emergency Management Agency, 854 F.2d 732, 737

(5th Cir. 1988). In other words, Defendants could and should have paid Plaintiff just compensation for the lands taken, which is the requirement under both Florida and federal law. Even if Defendants' actions were taken in a spirit other than the malice alleged, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922) (Holmes, C.J.). Furthermore, there is no evidence that either the State of Florida or the United States government conspired or colluded in denying Plaintiff its just compensation or other rights. The U.S. Fish & Wildlife agency clearly is not a necessary party to resolve this issue. Therefore, Plaintiff did not fail to join indispensable parties and the motion should be denied.

VI D. Brief of Law

Statute of Limitations

Plaintiffs claim of inverse condemnation is not barred by the statute of limitations -- an affirmative defense raised by Defendant Brevard County. As a threshold matter, the Defendant has the burden of proving its affirmative defenses. Captains Table, Inc. v. Khouri, 208 So. 2d 677 (Fla. 4th DCA 1968); Hough v. Menses, 95 So. 2d 410 (Fla. 1957). Defendant County cannot carry its burden of proof because an action for inverse condemnation "must be controlled by the four-year provision applicable to '[a]ny action not specifically provided for in these statutes.'" Sarasota Welfare Home, Inc. v. City of Sarasota, 666 So. 2d 171, 172 (Fla. 2nd DCA 1995) (quoting s 95.11(3)(p), Fla. Stat.. Furthermore, the general rule regarding when this four-year period begins to run is "from the time the cause of action accrues" and that "a cause of action accrues when the last element constituting the cause of action occurs." Id. 666 So. 2d at 172-73.

Here, the cause of action accrued, at the earliest, when the Scrub Jay Plan was de facto adopted on or about April 26, 1993; or, as Plaintiff contends when Plaintiff found that from and after October 1, 1994, when the availability of the MSBU for road construction was taken away, its market was destroyed as it could not sell any of The Lots without making full disclosure to potential purchasers of the various laws and duties constraining Plaintiff and potential buyers of Plaintiff's lots. Para. 13-14, Verified Second Amended Complaint. The taking was not complete until all possibilities of economic value were eliminated by the actions of Defendants. The present action for inverse condemnation was filed on September 4, 1996 -- less than 30 months after the final element of the taking occurred and well within the four years allowed by the statute of limitations. Defendants do not and cannot prove otherwise. Therefore, this action for inverse condemnation is not barred by the statute of limitations.

VI E. Brief of Law

Immunity

Monell v Department of Social Services, 436 US 658 (1978) found local governments were "persons" subject to §1983 liability.

Tower v Glover, 467 US 914 (1984) found liability for conspiracy conducted under color of state law and refused immunity for state prosecutors.

Howlett v Rose, 496 US 356 (1990) held that state immunity was not available in a §1983 action.

Hafer v Melo, 502 US 21 (1991) held that state officers may be personally liable for damages for actions taken in their official capacities.

Private parties also are not protected. In Lugar v Edmondson Oil Company, 457 US 922 (1982), it extended

liability to a corporate creditor and its president who acted under color of state law.

In June of 1997, the Supreme Court in Richardson v McKnight, 521 US 398 (1997) found that prison guards who are employees of a private prison management firm were not entitled to immunity.

The contract between DEP and the County required the County to be the acquiring agent. It hired TNC for that job. The contract specifies TNC is an independent contractor. TNC hired Judd to carry out TNC's duties. Richardson v McKnight, supra, controls.

All are liable under state law and under §1983.

VI F. Brief of Law

Eleventh Amendment

Defendant Brevard County clearly does not enjoy Eleventh Amendment immunity, neither in this case or elsewhere. "Eleventh Amendment immunity does not extend to independent political entities, such as counties." Tuveson v. Florida Governor's Council on Indian Affairs, 734 F.2d 730, 732 (11th Cir. 1984); Smith v. Avino, 866 F. Supp. 1399, 1403 (S.D. Fla. 1994); Thornquest v. King, 626 F. Supp. 486, 488 (M.D. Fla. 1985). The United States Supreme Court recently explained some of the rationale underlying the withholding of Eleventh Amendment immunity to counties is in Hess v. Port Authority Trans-Hudson Corporation, 513 U.S. 30, 47 (1994):

> Political subdivisions exist solely at the whim and behest of their State, yet cities and counties do not enjoy Eleventh Amendment immunity. * * * Moreover, rendering control dispositive does not home in on the impetus for the Eleventh Amendment: the prevention of federal-court judgments that must be paid out of a State's

> treasury. Accordingly, Courts of Appeals have recognized the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations. [Quotations and citations omitted.]

Here, the state treasury is in no way at risk for liability for an award against Brevard County to Plaintiff. Therefore, Brevard County cannot receive immunity under the Eleventh Amendment.

Furthermore, Brevard County is not an agent of the State of Florida for Eleventh Amendment purposes. All counties in Florida are afforded a great measure of independence and sovereignty in their actions with the state, including the independence of whether or not to enter into a voluntary contract for cost-sharing under the EELS program. (See County-State EELS contract.) The State of Florida's incentive program is not to be confused with coercion or unconstitutional conditions. See Adolph v. Federal Emergency Management Agency, 854 F.2d 732, 736 (5th Cir. 1988). At any rate, as noted in Hēss, control is not dispositive regarding Eleventh Amendment immunity. Id.

Moreover, the Eleventh Amendment concerns the federal judicial power used against the states. The case at bar concerns a State of Florida court adjudication of a dispute with a Florida county, and no United States court is directly involved. However, in state court, local entities remain subject to suit from federal claims to the same extent as they would be in federal court. In other words, when parties raise federal claims (at least, under Section 1983), then federal law must determine whether particular governmental entities are subject to suit." Hufford v. Rogers, 912 F.2d 1338, N. 1 (11th Cir. 1990) (citing Howlett v. Rose, 496 U.S. 356 (1990)). In Howlett, the Court found that local governmental entities, such as counties, were "persons"

under S 1983, were not immune under either the Eleventh Amendment or Florida sovereign immunity, and were subject to suit in Florida and federal courts for violations of S 1983. Id. In Howlett, the Florida District Court of Appeals' refusal to entertain s 1983 actions against state entities such as counties violates the Supremacy Clause. Id. Thus, despite the Eleventh Amendment, Brevard County is subject to the S 1983 counts in this Court.

Finally, the failure of the State of Florida to defend Brevard County is evidence that the Eleventh Amendment does not immunize Brevard County in this lawsuit. A factor that courts have sometimes found persuasive in determining whether the defendant is a state actor or agency, is who is representing the entity in the lawsuit. See Houck & Sons, Inc. v. Transylvania County, 852 F. Supp. 442, 450 (W.D. N.C. 1993). Here, Scott Knox, the Brevard County County Attorney, is representing Brevard County, and TNC has private Counsel. Thus, the County is not afforded Eleventh Amendment immunity and the motion should be denied.

VI G. Brief of Law

No Chapter 768.28 Notice Necessary

This is an action for a taking. Chapter 768.28 covers only matter ". . . to recover damages in tort. . . ". Nor are damages from an exercise of a government police power a tort. Neither can a state condition access to §1983 damages upon such notice. Howlett v Rose, supra.

This statute does not apply to private parties such as TNC and Judd. See Witmer v University of Florida Police Department, 610 So 2d 87 (Fla 1st DCA, 1992).

Here Plaintiff claims intentional acts of conspiracy as a part of the taking. Thus, it keys the same character as the taking and so is not within the statute. Moreover, the County, as a

"person" under §1983 has no protection per Howlett, supra.

VI H. Brief of Law

Conspiracy

The allegations of the Complaint are clear. The County wished to control Plaintiff's land without necessity to pay just compensation. It also wanted to stop all development and price increases while it "squeezed" its victims, the Core property owners.

Its policy was to pay as little as possible (Pfeffer depo), its tactics wee "to be meaner than a junk yard dog" (O'Brien statement). It changed its ordinances to shut down all use and all market while it awaited bargain purchases.

These facts were known by TNC and by Judd before they joined up (application of TNC, Deposition of Judd). The instruction to Judd was specific: 40¢ on the dollar. Judd went even further with his own method of pricing: the lowest comparable of the lowest appraisal.

TNC cited its ability to buy cheaply in each quarterly report. It cited "81% of market value" in its public hearing on contract renewal.

TNC was in charge of all acquisition activities. It was the actual wrong doer to carry out the conspiracy.

The Plaintiffs are not required to prove that each participant in the conspiracy knew "the exact limits of the illegal plan or the identity of all the participants." Hoffman-LaRoche, Inc. v Greenberg, 447 F2d 872, 875 (7th Cir. 1971). The Plaintiff must, however, prove that there is a single plan, "the essential nature and general scope of which is known to each person who is to be held responsible for its consequences". Richardson v City of Indianapolis, 658 F 2d 494 (7th Cir, 1981). A conspiracy may be proven by circumstantial evidence and should not be taken from the jury as long as there is a possibility

that a jury can reasonably infer from the circumstances that the required elements of conspiracy have been met. Hampton v Hanrahan, 600 F2d 600, 621 (7th Cir. 1979).

Chicago Miracle Temple Church, Inc. v Fox, 901 F Supp 1333, 1347-48 (ND Ill, 1995).

The Proffer of Evidence previously filed in this cause goes into this matter in such detail as would take pages here. Likewise, the depositions and the exhibits to the Complaint.

There are substantial facts of record.

VI I. Brief of Law Procedural Due Process

Defendants content Suitum and Williamson hold that a procedural due process claim cannot be brought until it has exhausted those procedures.

Actually, the quotation of Williamson in Suitum, (page 1665) is: ". . . the property owner cannot claim violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." (Emphasis supplied).

Suitum held that the claims were ripe. It further held (page 1670): "Suitum seeks not to be free from the regulations but to be paid for their consequences".

That is what we seek, plus the damages resulting from the failure of the Defendants to follow constitutionally imposed guarantees when those procedures are used.

VI J. Brief of Law Substantive Due Process

Plaintiff, as a matter of law, can maintain both a takings claim and a substantive due process claim in this lawsuit.

In the first place, Defendant misquote the holding of Villas of Lake Jackson, Ltd. v Leon County, 121 F 3d 610 (11th Cir. 1997). It allowed the combining of a substantive due process claim with a Takings Clause claim for arbitrary and capricious conduct. We certainly have that in the removal of the MSBU "by policy" from its uniform application. We also have

arbitrary and capricious conduce resulting in business damages as well as in the denial of just compensation and in the myriad "dirty tricks".

All of that is now irrelevant since Eastern Enterprises v Apfel, supra. That case was both for substantive due process and a taking. The majority of the judges split as to which remedy was the most appropriate and never questioned their joinder.

VI K. Brief of Law Jury Trial

Under Florida law of condemnation, the Judge decides if a taking has occurred. The landowner is then entitled to a jury of 12 to determine damages.

§1983 damages are provided by federal statute and federal law prevails, Howlett v Rose, supra. Federal law requires a jury trial both as to the question of whether a taking has occurred and also as to damages, DelMonte Dunes at Monterey Ltd v City of Monterey, 95 F3d 1422 (CA 9th, 1996)(cert pending).

The conspiracy cause is unquestionably a common law action with a right to a jury trial.

This does create a conflict as to one area only, the question of whether a constitutional taking has occurred.

Since a jury must be empaneled for the remaining questions, we believe the best procedure is to allow the entire case to be decided by the jury. If the Judge agrees with the jury verdict as to the taking, he can treat it as an advisory opinion and enter his concurring finding.

It is only in the event there is a split between the §1983 count and the taking count that the Judge could be in a dilemma. That can be discussed and provided for prior to trial.

/s/_____

Edward C. Tietig, P.A.

Attorney for the Plaintiff

Excerpt of Respondents TNC and Judd's Motion for Summary Judgment in Case No. 96-14296-CA

28. Actions brought under Title 42, Section 1983 for alleged violations of a plaintiff's property rights may be rendered as either procedural or substantive due process claims. Suitum V. Tahoe Regional Planning Agency, 117 S. Ct. 1659 (1997); Williamson County Regional Planning Commission V. Hamilton Bank of Johnson City, 105 S. Ct. 3108 (1985). Procedural due process claims attack the sufficiency of the procedures established by the State to protect the plaintiff's constitutional right to its property. Before a court may determine if the procedures provided by the State are sufficient, the plaintiff must first avail itself fully of those procedures, which includes litigating its claim for inverse condemnation to a conclusion. Id. Since the Plaintiff failed to litigate its claim for inverse condemnation to a conclusion, its procedural due process rights claim is not ripe for review. Id. Therefore, any claim by Plaintiff grounded in a violation of its right to procedural due process must be denied and judgment entered for the Defendants.

Excerpt of Respondents TNC and Judd's Memorandum of Law supporting their Motion for Summary Judgment

27. Plaintiff's apparent allegation of violation of procedural due process under 42 U.S.C. Section 1983 are not ripe for review by this Court.

28. It is well established that before Plaintiff may bring a claim for procedural due process, it must first exhaust its remedies for inverse condemnation. Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 105 S. Ct. 301(1985).

29. The purpose of this requirement is self evident. A landowner may not be heard to complain that the procedures afforded it are insufficient to protect its right to just

compensation until it actually utilizes those procedures and an outcome is determined.

30. The United States Supreme Court has held that in order to fully utilize the procedures provided by the State, the landowner is required to litigate to a conclusion its inverse condemnation claim under state law.

31. In Williamson, supra., the U.S. Supreme Court held that:

> [T]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. Nor does the Filth Amendment require that just compensation be paid in advance of, or Contemporaneously with, the taking; all that is required is that a "'reasonable, certain and adequate provision for obtaining compensation"' exist at the time of the taking. If me government has provided an adequate process for obtaining compensation and if resort to that process, "yield [s] just compensation, then the property owner "has no claim against the Government" A)r a caking. thus, we have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. Section 1491. Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation" (citations omitted).

Williamson. 105 5. Ct. at 3120-3121.

32. There is no longer any dispute under Florida law that a cause of action for inverse condemnation through the application of a land use restriction exists. See Tampa-Hillsborough County Expressway Authority v.

A.G.W.S. Corp., 640 So. 2d 34 (Fla. 1994); Department of Transportation v. Weisenfeld, 617 So. 2d 1071 (Fla 5th DCA 1993); Gardens Country Club v. Palm Reach County, 712 50. 2d 398 (Fla. 4th DCA 1998); I.T. Glisson v. Alachua County, 558 So. 2d 1030 (Fla. 1st DCA 1990).

33. Since Florida recognizes the tight to bring a cause of action for inverse condemnation, any claim that the Plaintiff has been denied just compensation under Amendment 5 of the United States Constitution is not ripe for review, and judgment should be entered in favor of Defendants. Sec also Villas of Lake Jackson Limited V. Leon County, 121 F. 3d 610 (11th Cir. 1997, holding that if a challenge to a regulatory taking claim states a claim at all, it is a cause of action under the "taking clause," and subject to the ripeness prerequisite of exhaustion of inverse condemnation cause of action.

Excerpt from Respondent Brevard County's Motion for Summary Judgment

9. The Plaintiff has not ripened its claim for inverse condemnation or for a civil rights violation under 42 USCA § 1983.

Excerpts from Petitioner's Initial Brief to the Fifth DCA in Appeal Number 99-2355

b. Issues of material fact exist with respect to whether Appellees destroyed F&G's economically viable use of its property. (P.34)

There is much evidence in the record to show that F&G was denied economically viable use of its property. For example: F&G averaged sales of 60 lots per year before the alleged taking occurred. After the taking occurred, F&G could not sell any Core lots (except a very

few as mitigation sales), and could sell very few of its non-Core lots in Cape Kennedy Estates. Thus, F&G's business was destroyed as a result of the actions of the Appellees, and F&G is entitled to compensation for the damages it suffered as a result of the destruction of its business. The Appellees argue that F&G's economically viable use of the property was not denied because there is a new market for mitigation land -- that is land that developers can purchase and not develop in order to mitigate their development in other areas. However, there is a factual question as to whether this market actually exists. Furthermore, the mitigation market is artificially created by the same regulatory body (the County) that is seeking to conserve that property. In other words even if this artificial market actually exists, the County created the market through its regulations. Joint Ventures, Inc. instructs that the County should not be allowed to use its regulatory powers to decrease the market value of the property so that the County can purchase the property for a lower amount. 563 So. 2d at 626. Similarly, allowing proof of the existence of a mitigation market (assuming *arguendo* that one exists) created by the County as proof that F&G has not lost all economically viable use of its property, is just another way for the County to use its police powers to obtain the property at less than fair market value.

Thus, F&G has shown that issues of material fact exist as to whether or not F&G was denied economically viable use of its property, and the trial court's decision granting summary judgment should be reversed.

* * *

D. F&G maintains a conspiracy under § 1983. (p. 43)

F&G adduces sufficient evidence to maintain its S 1983 conspiracy claim against all Defendants. To establish a prima facie case of conspiracy to violate rights protected by s 1983, a plaintiff must demonstrate that the defendants reached an understanding' to violate his rights. G.J.R. Investments, Inc., v. County of Escambia, Florida, 132 F.3d 1359, 1370 (11th Cir. 1998) (citing Strength v. Hubert, 854 F.2d 421, 425 (11th Cir. 1988)). Here, those rights are any of F&G's federal claims of Fifth Amendment Taking, Substantive Due Process, or Equal Protection. Furthermore, evidence is adduced that Defendants reached an understanding' to violate those rights. As argued previously, the contract between Brevard County and TNC is an express written agreement of the understanding to implement the de facto restrictions of the Scrub Jay Plan; to use controlled burns, publicity, and other means to devalue the land and implement the Plan; to use illegal methods to assess the value of affected lands; and, to pay F&G and other similarly situated landowners less than fair market value for the lands that are thereby acquired; i.e., taken. Also, TNC was aware of the below market value policy of the County (Pfeffer Deposition, Proffer of Evidence) and responded as early as their job-seeking Proposal of July 9, 1993 (Exhibit I to Complaint). It states in paragraph 3, Statement of Qualifications that TNC "negotiated... contracts ... 79.5% of the fair market value," that it was "experience in contracting for appropriate boundary mapping, surveys, environmental audits and appraisals" and that it "can assess the methodology employed by these professionals and its compliance with the standards required. . ." Id., P.5 Furthermore, TNC and the County's actions in concert with each other to

perform the contract and implement the Plan is also evidence of their understanding.

Regarding Judd, the evidence shows that Judd and his co-defendants reached an understanding to violate F&G's rights through the training of Judd to perform the Brevard County/TNC contract and his voluntary undertaking to do so. Specifically, Judd set the land prices and negotiated the acquisitions with landowners, telling them it was a "one-time only offer" and that funds were "limited." Then, Judd boasted of his success in acquiring the taken land for substantially less than fair market value.

Finally, insofar as they apply, Plaintiff incorporates its argument below regarding proof of civil conspiracy. Thus, for all of the foregoing reasons, the dismissal of the S 1983 conspiracy claim should be reversed.

* * *

B. F&G's federal takings, due process, and equal protection claims are ripe because the state procedure for obtaining just compensation is not adequate. (P. 46)

If the procedure the government provides for obtaining just compensation for a government taking is inadequate, then the plaintiff's Fifth Amendment takings, due process, and equal protection claims are ripe even if the plaintiff has not completed the process provided by the state. Agripost, Inc., 1999 WL 1032608. In this case, there are several reasons why the state procedure is inadequate and the plaintiff's § 1983 claims are ripe. Most importantly, the state claim for inverse condemnation can be made only against a government entity. However, § 1983 provides that a private entity (here TNC and Judd), can be sued for taking without just compensation if the

private entity is a state actor. Thus, the Florida state procedures offer no remedy to F&G against TNC and Judd for the taking. This becomes especially important because TNC and Judd can be liable for punitive damages as private parties, while the County cannot be required to pay punitive damages. Thus, the Florida state procedures are inadequate in this case because F&G is precluded from suing two defendants and is precluded from an entire category of potential damages.

Furthermore, the United States Supreme Court has recently decided that a plaintiff in a takings claim has a constitutional right to have that claim determined by a jury. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 119 S. Ct. 1624, 1638 (1999). The Seventh Amendment right to a jury trial does not apply to the states, id.; thus, a plaintiff in a claim for inverse condemnation in Florida is not entitled to a jury trial under Florida law. A plaintiff who is required to seek relief only based on state inverse condemnation claims will not be able to have a jury determine whether a taking occurred; therefore, the state procedures are inadequate and F&G's claims are ripe.

Moreover, the Florida state claim for inverse condemnation is inadequate because the measure of damages is different than in a federal takings claim. Fields v. Sarasota Manatee Airport Authority, 953 F.2d 1299 (11th Cir. 1992). Federal takings law requires compensation for decreased utility, while Florida inverse condemnation law does not. Id. The Florida cause of action for inverse condemnation requires proof that the property has actually decreased in value, while a federal takings claim under § 1983 requires only a showing that a difference in the market value of the property existed

because of the government's actions. Id.
Thus, because the measure and proof of damages in a state inverse condemnation claim differs from the measure and proof of damages in a federal inverse condemnation claim, the state inverse condemnation procedure is inadequate and F&G's federal claims are ripe.

Thus, F&G's § 1983 claims are ripe because the Florida inverse condemnation procedure is inadequate in that it does not provide a remedy against two defendants, F&G is precluded from any claim for punitive damages, F&G will not be able to obtain a jury trial in the state inverse condemnation claim, and the measure and proof of damages differs between a state inverse condemnation claim and federal takings claims.

Finally, if this Court does determine that F&G's federal claims are not ripe, then F&G should be allowed to make its Jennings reservation in the trial court as that will be the first time it will have been able to do so.

Excerpts from Petitioner's Initial Brief to the Fifth DCA in Appeal Number 00-649

II. THE TRIAL COURT ERRED IN DISMISSING THE EQUAL PROTECTION COUNT IN THE ROAD SUIT. (P. 20)

F&G adequately alleged and produced evidence to allow F&G to survive a motion to dismiss regarding its Equal Protection claim; and, as discussed in Section IV below, should have been allowed to try that claim before a jury. The Equal Protection claim is Count V of the Complaint in the "Road Suit," Case No. 96-4509 CAD,

and was dismissed by the trial court.[1] The only two bases for the trial court's dismissal of all counts that it dismissed in the Road Suit were that the property had "viable economic use and value" and that "real doubt is cast upon whether Plaintiff's asserted Claim is 'ripe.'"

The Equal Protection claim was properly alleged and could have been proven at trial because the issue was ripe and because the existence of some economic use or value does not preclude the claim. "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." Village of Willowbrook v. Olech, 120 S. Ct. 1073, 1074-75 (2000) (internal quotations and citation omitted, recognizing successful equal protection claims brought by a "class of one"). A regulation is invalid and will not be sustained if the classification drawn by the statute is not rationally related to a legitimate state interest. See City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985); Executive 100, Inc., v. Martin County, 922 F.2d 1536, 1540 (11th Cir. 1991) (holding that a plaintiff may claim an Equal Protection violation when the regulation creates a classification that involves the exercise of a fundamental right); Eide v. Sarasota County, 908 F.2d 716, 722 (11th Cir. 1990) (recognizing both facial and as-applied Equal

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[1]Because the Equal Protection claim was dismissed on a motion to dismiss, the trial court is not entitled to any deference, and this Court should review the matter de novo, taking all facts and reasonable inferences in favor of F&G. Hearndon v. Graham, 2000 WL 1288688 2 (Fla. Sept. 14, 2000).

Protection violations for landowners). To state a claim for a violation of the constitutional right to Equal Protection under the law, a plaintiff must allege that it was treated differently than similarly situated people. Olech, 120 S. Ct. 1073, 1074-75. When the challenged classification involves the exercise of a fundamental constitutional right, the court must examine the classification with strict scrutiny, and the classification must be narrowly tailored to serve a compelling state interest. In re Estate of Greenberg, 390 So. 2d 40, 42-43 (Fla. 1980) (citing Roe v. Wade, 410 U.S. 113 (1973); Dunn v. Blumstein, 405 U.S. 330 (1972); Bullock v. Carter, 405 U.S. 134 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969); Williams v. Rhodes, 393 U.S. 23 (1968); and Skinner v. Oklahoma, 316 U.S. 535 (1942)). "This test, which is almost always fatal in its application, imposes a heavy burden of justification upon the state and applies only when the statute operates to the disadvantage of some suspect class such as race, nationality, or alienage or impinges upon a fundamental right explicitly or implicitly protected by the constitution." Id. The fundamental rights that are entitled to strict scrutiny analysis are those rights explicitly or implicitly guaranteed by the constitution. Id. As the right to hold property is explicitly delineated in the Constitution, it is a fundamental right entitled to strict scrutiny analysis for equal protection purposes. Here, F&G stated a claim under the Equal Protection clause because Defendants' actions had affected the economic use and value of the property at the time the claim was made; and, as described below, the County's actions (and TNC's actions as co-conspirator and state actor) against F&G bear no rational relationship to a legitimate governmental interest, much less meeting the

standards required by strict scrutiny analysis of being narrowly tailored to serve a compelling state interest.

Whether F&G's property retained some economic use and value is irrelevant under Equal Protection analysis because, inter alia, "the establishment of a constitutionally protectible property interest is wholly irrelevant to an equal protection claim. . . . An equal protection claim revolves around whether similarly situated persons are treated differently." The Reserve, Ltd., v. Town of Longboat Key, 17 F.3d 1374, 1381 (11th Cir. 1994) (citing City of Cleburne, 473 U.S. at 439). Here, in addition to asserting constitutionally protected fundamental rights, Farm & Grove adduces substantial record evidence that it is being treated differently from similarly situated property owners as a "class of one." As compared to other landowners situated in the Valkaria and Ten-Mile Ridge Refugia areas, the County and TNC treated F&G differently when, for instance, Defendants used the improper "bulk sale" appraisal method for F&G lots, imposed unreasonable delays in approving F&G's applications for permits, required F&G to irrationally engineer roadways and swales that would improperly divert storm-water runoff away from drainage ditches, and deliberately delayed land purchase negotiations with F&G in an attempt to force sales of F&G's lots at distress prices -- all actions by Defendants against F&G only.

Regarding the class consisting of F&G and those other (similarly situated) property owners within the Refugia areas, vis-a-vis the property owners outside of the Refugia areas, F&G raised an issue of material fact as to whether F&G and the other in-Refugia owners were denied Equal Protection when Defendants waived all road

requirements for similar rural/acreage lots in West Canaveral Groves, an area of Brevard County strikingly similar to Cape Kennedy Estates in all relevant ways. Also, the County created the Valkaria Grant Stormwater District, which had different drainage standards than any other part of Brevard County, and was based on the boarders of CKE and not based on any rational engineering or other reason.

Also, substantial evidence would allow a jury to find that the in-Refugia class was denied its Equal Protection rights when Defendants diverged from statutory land valuation, quantification, and qualification standards. For instance, Defendants improperly denied F&G and its class credit for all of the land area of easements; appraised property on a per-lot basis, rather than on an acreage basis; and, used non-economic comparable sales in appraising land values.

Insofar as F&G is a member of the class of property owners of property more than 1320 feet from a county paved road, as opposed to owners of property less than 1320 feet from a county paved road, F&G is a member of that class that cannot build any road under the ordinances. Moreover, the County's irrational system, enacted after the sale of all CKE lots in 1968-72 to many hundreds of different owners across the globe, requires that a road must be in place before a building permit will be issued to build a house, but a house must be in place before a MSBU can be used to fund the economically feasible and equitable road construction, creating a Catch-22 that effectively prevents both road and house construction by F&G and its class of property owners more than 1320 feet from a county-maintained, paved road.

Additionally, F&G is a member of the class of

owners of property less than 1320 feet from a county-maintained, paved road where housing does not exist, as opposed to owners of property less than 1320 feet from a county-maintained, paved road where housing does exist. F&G's class is inordinately burdened by the road ordinances requiring the class to bear of costs of road construction without any equitable contribution from adjacent landowners who thereby enjoy windfall benefits from F&G's bearing of the entire cost of the road construction. The evidence clearly shows that the County has no rational basis to prevent the equitable contribution.

Furthermore, even if the ordinances at issue were facially neutral, the ordinances deny Farm & Grove its Equal Protection rights because evidence shows that the ordinances were applied to Farm & Grove with discriminatory animus. "[T]o prevail on a claim that defendant unequally applied a facially neutral statute, a plaintiff must show intentional discrimination. E & T Realty v. Strickland, 830 F.2d 1107, 1112 (11th Cir. 1987)." The Reserve, Ltd., 17 F.3d at 1381 (finding that evidence of prior unrelated civic disputes and activism by plaintiff corporation's principal could prove requisite animus); see also Olech v. Village of Willowbrook, 160 F.3d 386 (7th Cir. 1998) (finding that allegation of prior litigation between parties stated requisite ill will). Here, the acts suffered by F&G as described above, particularly as a "class of one", are evidence of such animus. Also, evidence was adduced regarding Mr. Edward Tietig's (F&G's President and owner) prior disputes, in his capacity as chairman of the Grant Drainage District, regarding dedications of roads and similar matters; and, to take autonomy away from Mr. Tietig, the Grant Drainage

District was subsequently metamorphosed by the County into a drainage district under Brevard County's control that irrationally contained parts of several different watersheds, and did not include the complete watershed for any one watershed. Moreover, Brevard County enacted what is essentially a bill of attainder against Mr. Tietig that changed the voting for a MSBU from a one-vote-per-lot basis to a one-vote-per-landowner basis, thereby negating Mr. Tietig's majority status on the relevant roadway and affecting no other landowner in a like manner.

The County later gave two justifications for its actions: protection of the scrub jay and prevention of urban sprawl. However, F&G adduced evidenced that the County's actions were not rationally related to its justifications and that the real motive was to obtain the property in the scrub habitat at less than market value by forcing F&G to sell, and this allegation should have gone to the jury for determination.

A. <u>The County's intent to avoid paying fair market value for core lots.</u>

First, the County has evidenced a strong intent to avoid paying fair market value for the core lots. The County received federal grants for $300,000 to develop the Scrub Conservation Development Plan (SCDP), which is the plan that first delineated the core areas. (TT 345; 549.) However, when the SCDP was actually presented to the County, the County's attorney warned that officially adopting the plan could require the County to pay for the lots. (P's Ex. 40.) In fact, the SCDP prohibited owners of core lots from building on those lots, without any mitigation option, and these owners would be paid fair market value for their property. (P's Ex. 41; TT 352.) So,

rather than officially adopting the plan and paying the property owners fair market value, the County sent the SCDP to the EEL program with instructions to begin implementing the plan by purchasing the lots designated as core areas. (P's Ex. 40.) Ann Birch, the director of the EEL program testified that it was her goal to purchase all of the lots in the core areas (TT 452, 451), and Lori Thoms, TNC's acquisition agent testified that it is her job to purchase all of the lots in the core areas. (TT 458) Additionally, the County hired TNC as its acquisition agent. (P's Ex. 38, 39.) During the bidding process for the contract that was eventually awarded to TNC, County Commissioner O'Brien stated that he wanted an acquisition agent who was "meaner than a junkyard dog" so that the County could acquire the lots as cheaply as possible. (TT 354.) In fact, TNC's application and performance reports boast that TNC is successful in acquiring conservation property at less than fair market value. (P's Ex. 38, 39.) In its application to the County, TNC gives the example that it was able to purchase property in Brevard County known as "The Enchanted Forest" on the courthouse steps for only $100 over the mortgage by refusing to negotiate with the property owner, knowing the property owner was in financial dire straits. (P's Ex. 39.) The application explains that TNC waited until the mortgagee foreclosed on the property, made a private arrangement with the mortgagee prior to the foreclosure sale, and purchased the property for $100 over the loan balance. (P's Ex. 39.) Thus, the County's intent to pay less than fair market value for the lots is clear.

B. <u>The County's attempts to force F&G to sell for less than fair market value.</u>

Not only was the County's true goal to obtain the core lots for less than fair market value, a reasonable jury could infer that the County also sought to force F&G to sell its lots for less than fair market value.

1. **Intimidating sales tactics to deflate market**

First, in the spring of 1994, the County sent out a letter to all property owners in the core area that the County intended to buy the property for conservation purposes. This served to artificially deflate the market because individual buyers were immediately wary of purchasing lots in a land designated for the County's conservation purposes. Moreover, TNC sent letters telling property owners that funds were limited, and they would be making a one-time offer on the property. This served to intimidate lot owners into selling to the County for whatever TNC offered for fear that the property could no longer be used because it was designated to be purchased for conservation, that no one else would want to purchase the property, that the County would never make another offer, and that the property owner would be left with worthless property that they could never sell (which is an admission of what Defendants did to F&G).

2. **Regulatory methods of decreasing value of lots and slowing development**

At the same time the County began its purchasing efforts in earnest, the County began passing ordinances to further deflate the market and to slow development in the core areas. The County showed its intent to use its regulatory powers to help it obtain its conservation goals in the land acquisition manual for the EEL program. The manual stated, "The County's policy is to purchase land when other means, such as zoning or regulation, are not

appropriate, available, or effective to achieve the program's conservation goals and objectives." Assistant County Manager Steven Peffer also stated that their were mechanisms to address environmental concerns without purchasing the land. The manual also stated, "Zoning can be used to provide some measure of protection to both Natural Resources and property values." Thus, it was the County's policy to use zoning and regulation to meet its conservation goals, which included the deflation of the market so that the County could purchase lots for less than fair market value.

The County first changed the ordinance that provided for an MSBU for equitable contributions to build roads by increasing the requirement for participation from 50% to 75%. Then, when it became evident that the MSBU ordinance would be used to build roads even at that rate because Mr. Tietig, through F&G's sister company, Villa Sol, had attempted to assemble lots, the County altered the ordinance so that no matter how many lots a property owner owned, the owner got one vote in the MSBU participation calculation; however, that owner was still assessed under the MSBU for each lot owned. This blatant animus toward Mr. Tietig & F&G is evidenced by the County's admission that this policy changed at the same meeting in which Mr. Tietig, on behalf of Villa Sol, requested an MSBU for roads with a per-lot participation ratio of 91%. After the ordinance was changed, F&G and Villa Sol could not obtain a 75% participation rate because Mr. Tietig's companies were allowed only one vote even though they owned a large majority of the affected lots.

The County also passed a resolution that allowed the MSBU ordinance to be used for roads only in areas

where houses already existed. This created a catch 22 for core lot owners because an owner could not obtain a building permit unless there was a road, and the owner could not get the road unless more than half of the lots on the road were already permitted.

In addition to the elimination of the MSBU ordinance for paved roads in CKE, the County required that a dirt road be put in before a building permit could be granted; however, the maximum length of the dirt road was 1320 feet. Thus, owners more than 1320 feet from an existing County-maintained, paved road could not build at all, and owners less than 1320 feet from an existing County-maintained paved road could not built unless they first paid for and installed a County-approved dirt road. The unpaved road ordinance had no provision for equitable contribution, so the individual property owner was required to bear the entire cost of the road, which made building the road economically unfeasible unless eight or more of the ten lots could be assembled by one owner. The County knew that this was very unlikely because the lots had originally been sold to diverse buyers, most of whom lived outside of the state. So, between the changes in the MSBU ordinance for paved roads, and the refusal to include an MSBU or other mechanism for equitable contribution for unpaved roads, the County knew that the CKE lots (and, therefore, the core lots) were unlikely to develop, and the County could take its time purchasing the lots that were now essentially worthless in the private market.

3. **Using permitting delays to place economic pressure on F&G to sell for less than fair market value.**

In 1994, when it became clear to F&G that it would not be able to sell its lots in the core because the lots did not abut previously existing County-maintained paved roads, F&G was forced to try to build some roads just to survive. When F&G put in applications for the roads, the County delayed the process far beyond when it would have approved permits for other (similarly situated) applicants. No justification was given for the delays. Also, the County created engineering standards for F&G's roads that were unfeasible, impractical, and irrational from an engineering point of view. F&G's expert engineer testified that these standards were much higher than any other standards he had seen for unpaved roads in previous permit applications with the County for other applicants. The engineer also testified that it took two to two-and-one-half years to get the road permits for F&G when normally those permits took an average of 60 days for him to obtain for applicants other than F&G. In fact, the engineer testified that during the same time frame, he obtained unpaved road permits for the County in two weeks.

The County also artificially increased road standards only in the CKE area by creating the Valkaria Grant Stormwater District. F&G's engineer testified that the boundaries of this new stormwater district were virtually identical to the boundaries of CKE. The engineer also testified that these boundaries made little sense from an engineering perspective because they included portions of four separate basins, but of those four basins, the boundaries included only one relatively complete basin. Thus, those boundaries were created so that the County could impose stricter road permitting standards that applied only to the CKE area, which is where the two core

areas of scrub habitat were located.

4. Making lots dangerous, inaccessible, and physically unattractive

In addition to regulatory activities to make the lots unattractive to potential purchasers, the County also implemented methods to make the lots dangerous, inaccessible, and physically unattractive. First, the County made the lots difficult for potential purchasers to see by blocking physical access. The County erected fences, gates, ditches and berms blocking physical access to the County's lots, and, thus, to the easements and rights of way that would allow potential purchasers to get to lots for sale. Additionally, the County posted no trespassing signs on the fences blocking the easements and rights of way so that potential purchasers would be afraid to cross County property to get to lots for potential purchase.

The County also made the lots physically unappealing by clearcutting County owned property, decreasing the natural beauty of the areas in view of non-County property that might be for sale. Furthermore, the County entered into and published a CARL contract, which explains that controlled burns are required for management of conservation areas. With the recent history of out-of-control burns, the prospect of having "controlled burns" on adjacent property made potential purchasers reluctant to purchase in or near the core area.

5. Attempting to force sale for below market value through improper valuation methods.

First, the County obtained appraisals using invalid valuation methods. Rather than using the more than 600 sales by F&G or other open market transactions as comparable sales for the appraisal, the appraisals used 5 lot

sales made to the County for conservation purposes. This practice was specifically and statutorily banned by federal appraisal standards (USPAP) as supplemented by Florida Supplemental Standards. (Monograph, Exhibit H to Complaint.) These standards, which, under Florida law, (§§ 475.615 (4), 475.624(14) Fla. Stat.), must be followed, were ignored, despite specific language in the County's contract with the State of Florida that confirmed this requirement. (Exhibit E to Complaint.)

Next, contrary to USPAP standards, the County based their appraisals on a per acre basis, despite the local practice of sales on a per lot basis rather than a per acre basis. Also, the appraisals discounted for road easements that the County knew would not devalue the property if the property was to be used for conservation purposes because the roads would never be built.

Moreover, the County based its Master Appraisal Survey on the federal definition of wetlands, which is more expansive than the State of Florida's statutorily required definition. Thus, more lots were devalued as wetlands than were actually defined as wetlands in the state definition, violating Rule 62-340.100 F.A.C. requiring these types of appraisals to use the Florida state definition of wetlands. Thus, the property was inappropriately devalued as wetlands.

Based on all of this evidence, a reasonable jury could find that the County's true motivation was not to protect scrub jays or to prevent urban sprawl, but to obtain the core property for less than fair market value.

C. <u>The County's actions that are inconsistent with its purported goals of protecting the scrub jay and preventing urban sprawl.</u>

If the County's actions were truly motivated by the goal of protecting the scrub jay, the County would have been required to obtain all of the property in the core areas. The SCDP was to be used to mitigate for the development of scrub habitat in other parts of the County. In order to meet the goal of ensuring the survival of the scrub jay in Brevard County, the SCDP required the core areas to be undeveloped so that the remaining scrub habitat in the County could be developed outside of the core areas, which was less desirable scrub habitat than the core areas. However, in order for the SCDP to meet its goal of actually ensuring the survival of the species, the County would have to actually control the entire core areas and prevent those areas from developing. Thus, if the County's goal was truly to save the scrub jay, it would have either immediately halted all development in the core areas or limited development of all scrub habitat in the County, whether within or outside of the core areas. However, instead of doing this, the County continued to allow all scrub habitat in the County to develop, including the core and non-core areas of scrub habitat throughout the County. As shown in the discussion above, the reason the County did not immediately stop all development in the core areas was to avoid having to pay fair market value for the lots in the core.

With respect to the prevention of urban sprawl, the County could not have been very concerned about this issue because the County allowed the area of West Canaveral Groves to develop in contravention of every method of preventing urban sprawl. For example, the roads in West Canaveral Groves do not comply with County requirements for roads in the CKE area. The

buildings in the West Canaveral Groves area do not comply with County building codes, and they have not been permitted. There is no infrastructure for the provision of water to residents of West Canaveral Groves. The only excuse the County can give for West Canaveral Groves to be allowed to develop in contravention to these urban sprawl issues is that it just happened without the County knowing about it. However, Assistant County Manager Peggy Busacca testified that when the County first learned of the problems in West Canaveral Groves there were probably 30 units built. (TT 535) Now, West Canaveral Groves is still not in compliance with what the County claims are urban sprawl prevention ordinances, and the number of families Ms. Busacca estimates live there has grown to approximately 100. (TT 486-489.) Thus, the County has known about the West Canaveral Groves development in contravention to urban sprawl prevention policies, but the County has allowed the development to continue.

Perhaps the most telling evidence that the road ordinances were not changed to deal with urban sprawl issues is the timing of the enactment of the various ordinances. Ms. Busacca testified that the County was informed by the State of Florida that the County's development policies were deficient in preventing urban sprawl. However, the County did not enact the unpaved road ordinance 1320 foot distance limitation until November of 1993. (93-27) The 1991 unpaved road ordinance did not include any distance limitation. (91-08). Moreover the 1991 unpaved road ordinance allowed for no-maintenance agreements, which would relieve the County of the responsibility of maintaining unpaved roads.

Because these unpaved roads with no-maintenance agreements were not maintained by the County, it seems likely that the quality of those unpaved roads would quickly decline. Thus, the 1991 unpaved road ordinance was not likely to prevent urban sprawl. Rather, it provided a mechanism to assist in the creation of roads in undeveloped or newly developed areas that could easily deteriorate without maintenance required by the County.

Even more telling is the adoption of the MSBU ordinance in July of 1991 (91-12), which provided for the first time that paved roads could be funded through an MSBU. If the County were truly worried about urban sprawl in 1991 when it enacted the unpaved road ordinance, it would not have provided a mechanism to make the building of new roads easier. If prevention of urban sprawl were the reason for the elimination of the MSBU in 1994, then the County never would have enacted the ordinance in 1991, three years after the State had informed the County of its urban sprawl problems. Thus, based on the timing admitted to by the County, it seems unlikely that the County's purpose in eliminating the MSBU in 1994 and enacting the distance limitation on unpaved roads in November of 1993 had anything to do with the prevention of urban sprawl. More likely, the changes in the ordinances had to do with the event contemporaneously occurring in the County, which was the beginning of the County's attempt to acquire the lots in the core for less than fair market value, particularly as the two main undeveloped areas remaining in the County at that time were CKE and West Canaveral Groves. Because West Canaveral Groves had special allowances with respect to development requirements, the County could safely

enact these development restrictions because the only area really impacted by the changes was CKE, where the County wanted all development to stop in the core areas.

Also, evidence showed that the County allowed development of land on the far side of CKE, more remote from public services and infrastructure than CKE lots. Thus, F&G was not provided equal protection under the law, and the classification of F&G was not rationally related to any legitimate County interest. Thus, this Court should reverse the trial court's dismissal of the Equal Protection Count and allow the claim to proceed to the jury.

Supre
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No. 01-531

In The

Supreme Court of the United States

FARM & GROVE REALTY COMPANY,

Petitioner,

v.

BREVARD COUNTY, FLORIDA, THE NATURE CONSERVANCY, and KEVIN JUDD,

Respondents.

On Petition For Writ Of Certiorari To The District Court Of Appeal For The State Of Florida, Fifth District

BRIEF FOR THE RESPONDENTS, THE NATURE CONSERVANCY AND KEVIN JUDD, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether any basis for review by this Court pursuant to its certiorari jurisdiction is presented by the *per curiam* affirmance, without opinion, by the Florida Fifth District Court of Appeal of the state trial court's entry of a summary judgment against the Petitioner on its takings and due process claims against Respondents, The Nature Conservancy and Kevin Judd,[1] where the state court decision could have rested on a non-federal ground and, under the facts presented, no cause of action under 42 U.S.C. §1983 existed. (Petitioner's Questions 4-6).

(2) Whether any basis for review by this Court pursuant to its certiorari jurisdiction is presented by the *per curiam* affirmance, without opinion, by the Florida Fifth District Court of Appeal of the state trial court's entry of a summary judgment against Petitioner on its conspiracy claim against these Respondents where the state court decision could have rested on a non-federal ground, and, under the facts presented, no federal cause of action for conspiracy was established. (Petitioner's Question 7).

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[1] The present Brief in Opposition is presented on behalf of the Respondents, The Nature Conservancy and Kevin Judd and addresses only those issues presented in the Petition for Writ of Certiorari relevant to these Respondents. Respondent Brevard County, Florida, will be submitting a separate Brief in Opposition addressing the issues relevant to it.

CORPORATE DISCLOSURE STATEMENT

The Nature Conservancy, Inc. has no parent corporation, and no non-wholly owned subsidiaries.

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The *per curiam* decision of the District Court of Appeal for the State of Florida, Fifth District, is published in a table without reported opinion at 785 So. 2d 498 (Fla. 5th DCA 2001). The Order on Motion for Summary Judgment of the Circuit Court of the Eighteenth Judicial Circuit, in and for Brevard County, Florida, is unreported and is found at AI-5-6 of Petitioner's Appendix.

JURISDICTION

The Judgment of the District Court of Appeal was entered on April 17, 2001. The Petition for Writ of Certiorari was filed on July 16, 2001. The jurisdiction of the Court is sought to be invoked under 28 U.S.C. § 1257(A).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

The Fifth and Fourteenth Amendments to the United States Constitution as well as Brevard County Ordinances 80-50, 91-08, 91-12 and 93-27 are set forth in Petitioner's Appendix. 42 U.S.C. § 1983 reads in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

> Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT

Petitioner's statement of the facts is replete with misstatements, unsupported inferences and improper argument. A representative example is found at page 10 of the Petition where Petitioner asserts: "The County and TNC [The Nature Conservancy], specifically trained Judd to follow methods to obtain property at less than fair market value. (Judd Depo. at 31 & 32.)" No such testimony is found in this portion of Mr. Judd's deposition. (R-2979-2980).[2] Nor is it found anywhere else in his deposition. Respondents, The Nature Conservancy ("TNC") and Kevin Judd (hereafter "Respondents"), rather than seeking to respond to each and every mischaracterization of the record, submit the following statement as an accurate rendition of the material facts necessary to the consideration of the questions presented.

Action was brought by the Petitioner, Farm and Grove Realty Company, on its Second Amended Complaint for inverse condemnation and for damages sounding in three counts: Count I was a count for inverse condemnation against Co-Respondent Brevard County, Florida; Count II was a count seeking damages pursuant to 42 U.S.C. § 1983 as against Respondents and Co-

[2] "R" refers to the Record on Appeal before the Florida Fifth District Court of Appeal.

Respondent for violation of the takings and due process clauses of the Fifth and Fourteenth Amendments; and Count III sought damages for conspiracy as against Respondents and Co-Respondent. (AII-2-19). Summary judgment was entered against Petitioner and for Respondents on Counts II and III of the Second Amended Complaint, effectively removing Respondents from the remainder of the case which went forward against Co-Respondent on Count I. (AI-5-6). Petitioner appealed the granting of summary judgment to the District Court of Appeal for the State of Florida, Fifth District. While the appeal was pending, the claim against Co-Respondent Brevard County for inverse condemnation was tried. After trial, final judgment was entered for the County and against Petitioner on the inverse condemnation claim. (AI-10-12). That Final Judgment was also appealed and was consolidated with the appeal from the granting of summary judgment to Respondents. The District Court of Appeal's *per curiam* affirmance without opinion was entered as to the consolidated appeals. (AI-9).

In essence, Petitioner alleged in its Second Amended Complaint that the County illegally and unconstitutionally destroyed the market for property the Petitioner was selling by designating the property for acquisition as scrub jay habitat and by restricting building on Petitioner's property through unreasonable road ordinances. It was further alleged that Respondents conspired with the County in its effort to destroy the market for Petitioner's property and engaged in unfair negotiating practices toward a goal of purchasing that property below fair market value.

Petitioner was the owner of vacant, non-contiguous, unimproved lots of approximately 1.5 acres scattered throughout a 6,700 lot plat. (R 1356). Since prior to Petitioner's purchase of its lots in 1981, all of the lots listed in its Second Amended Complaint have been subject to oversight by the United States Fish and Wildlife Service ("USFWS") pursuant to the Endangered Species Act, 16 U.S.C. § 1540.

Pursuant to the Act, the County had studied several plans to protect the habitat of the Florida scrub jay. A proposed ordinance that would mitigate scrub jay impacts, referred to as the Scrub Jay Plan, was considered but never enacted by the County. (R 3144). As such, no County ordinance existed or exists prohibiting or limiting the development of Petitioner's property due to the existence of scrub jay or scrub jay habitat. (R 3146-3147). The only development limitations placed upon Petitioner's property relating to its status as a scrub jay habitat were the permitting requirements of the USFWS. (R 2019, 3428-3429). A plan that was adopted by the County was what it called its Environmentally Endangered Lands program ("EEL"). This program called for the County to purchase environmentally sensitive land from willing sellers, including scrub jay habitat. (R 3136-3139). The EEL program, as a willing buyer/willing seller program, neither prohibited nor regulated the development of property targeted for purchase. (R 3146-3147).

While there existed no environmental regulations, federal, state or local, which would preclude the development of Petitioner's lots, County ordinances have, at all relevant times, required that lots have road access prior to the issuance of building permits. These ordinances

are applicable to all properties in the County. (R 1379-1452, 1906-1910; AI-14-17). At the time Petitioner purchased its lots in 1981, there was no formal mechanism in place to obtain or compel County funding for the construction of access roads to Petitioner's lots. Subsequently, in 1991, the County enacted an ordinance allowing for the establishment of Municipal Service Benefit Units ("MSBUs") which would permit the owners of lands located in the same right of way to accept assessments against their property in exchange for the County providing the capital funding necessary to construct the roads. (AI-25-49). Also in 1991, the County passed Ordinance 91-08 which allowed for the issuance of building permits where access was provided to lots by either private roads, 25 foot wide easements or unpaved roads to properties within one quarter mile of a County maintained roadway. (AI-18-24). Eventually, the MSBU Ordinance was modified and this type of funding was no longer available for the construction of paved roads except as provided by Ordinance 91-08, as amended. However, access by unpaved roads, exclusive easements and private roads remained available at all times as allowable access to obtain a building permit. (AI-50-58).

Subsequent to the enactment of Ordinance 93-27, the County entered into a contract with Respondent The Nature Conservancy (TNC) to assist in the implementation of the EEL program. This contract was also entered into well after Petitioner's property had been identified as a scrub jay habitat. (R 2205-2225, 3149-3150). Neither

TNC nor Respondent Judd[3] played any policy making role in identifying land for acquisition under the EEL program. Nor was TNC or Judd involved in the management of preservation lands acquired by the County. Under the contract, the scope of TNC's involvement was to act as a purchasing agent for the County. If TNC was to manage the land once it was purchased, a separate agreement would be required. (R 2219, 3027; Second Amended Complaint, Exhibit "K"). Similarly, neither Respondent hired or contracted the appraisers whose opinions would form the basis for any offers to purchase property pursuant to the EEL program. Respondents' role in the acquisition process was limited to negotiating the purchase of lands identified by the County and to be paid for by government funds. (R 2970, 3150, 3154).

As part of the general effort to preserve environmentally valuable lands, federal, state and local governments, along with private conservation groups, often fund the purchase of land for preservation purposes. Developers, in order to obtain development approvals, are often required to set aside property or purchase and dedicate property for preservation to offset the impact of their development activities. The need for such "mitigation property" for purchase by developers in Brevard County has created a substantial market for scrub jay habitat, i.e., for the purchase and sale of lots such as those owned by Petitioner. (R 3407, 3449, 3477-3478). The price typically

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[3] At about the time that TNC and the County entered into this agreement, Judd was hired by TNC as a field representative. (R 2964-2966).

paid by such a developer for scrub jay land in Brevard County was approximately $5,000.00 an acre. (R 3426).

Against this backdrop, Petitioner's property was identified by the County as scrub jay habitat appropriate for acquisition under the EEL program. (R 1355-1378). TNC contacted Petitioner to determine its willingness to sell its property to the County. (R 3030-3031). As required by statutes governing state purchase of property, appraisals were ordered by the County. (R 2967, 2969). Prior to the completion of those appraisals TNC made a verbal offer of $2,000.00 per acre for the purchase of Petitioner's property, an offer less than the appraised value. (R 2993). This offer was rejected and, subsequent to receipt of the appraisals, the County substantially increased its offer. This offer, too, was rejected. (R 3207-3208, 3476). Petitioner's counter-proposals for the sale of its property always included claims for damage allegedly caused by the regulatory actions of the County. These counter-offers were refused. (R 3314-3316). Petitioner then filed the present action.

After the filing of the action, Petitioner sold a number of the lots described in its complaint for mitigation purposes receiving approximately $5,000.00 per acre. Petitioner chose to stop marketing many of its lots, however, because it believed that they could not be marketed as homesites. (R 3252, 3345-3347, 3477-3478).

Petitioner never applied for the creation of an MSBU for a paved road, but was granted an MSBU for unpaved road construction. As of the date of the summary judgment order, applications to construct unpaved roads had not yet been acted upon by the County. (R 2548-2574).

Petitioners never made any improvements to its lots, the lots having always been sold as raw land.

What is *not* found in the record which was before the trial court at the time of its order granting summary judgment are any facts or even reasonable inferences to support claims that Respondents conspired with or acted together with the County to "rig" wetland determinations, acreage computations, appraisals or offering prices to cause Petitioner to sell its property at an inadequate price; knowledge by Respondents of any of the County's decisions concerning development of building or zoning policies concerning road ordinances, MSBU ordinances, or management of property acquired for preservation; evidence that the EEL program, as enacted, prevented development of land; applications by Petitioner, or denials by the County, of building permits for any of Petitioner's property; denial of plans for putting in roads, sewer, water or any other improvements for Petitioner's property; or any actions taken by Petitioner, including seeking variances from developmental regulations, to develop the property or make it more developable. The only evidence in the record demonstrates that Petitioner sought only to continue to pursue its original strategy of selling undeveloped lots. (R 3208-3209, 1-3508).

ARGUMENT

1. Petitioner contends (Pet. 20-25) that the trial court's ruling granting summary judgment in favor of Respondents on Petitioner's Fifth and Fourteenth Amendment takings claims, as upheld by the Florida

appellate court, was necessarily based on ripeness grounds, i.e., that Petitioner had not availed itself of existing adequate state remedies, and that the state courts' decisions in this regard present important federal questions that require review by this Court. To the contrary, Petitioner failed to establish, and the record does not support, its claim that Florida's Fifth District Court of Appeal, the state court of last resort, in its *per curiam* affirmance of the trial court, has decided *any* federal question, much less an important federal question justifying review by this Court. To the extent that federal questions were raised before and decided by the state appellate court, they were properly decided.

The issues presented were decided in the trial court on a motion for summary judgment. Under both the federal and state standards, summary judgment is appropriate where there are no material facts in dispute and the evidence before the court establishes that the moving party is entitled to a judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Ingram v. Brookins*, 597 So. 2d 385 (Fla. 2d DCA 1992); Fed. R. Civ. P. 56(c); Fla. R. Civ. P. 1.510(c). The party opposing a motion for summary judgment must present evidence, not simply legal argument, demonstrating the existence of a disputed issue of material fact. See, e.g., *Gray v. Darien*, 927 F.2d 69 (2d Cir. 1991), *cert. denied*, 502 U.S. 856 (1991); *Woodruff v. Government Employees Insurance Company*, 669 So. 2d 1114 (Fla. 1st DCA 1996). Moreover, summary judgment is a useful and utilized tool in dispensing with cases alleging conspiracy or violations of constitutional and federal law where the undisputed material facts support judgment as

a matter of law. See, e.g., *Village of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610 (11th Cir. 1997) (summary judgment upheld on due process takings claim); *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208 (11th Cir. 1995) (summary judgment upheld on claim that regulations were an unconstitutional taking and violated substantive due process); *Paedae v. Escambia County*, 709 So. 2d 575 (Fla. 1st DCA 1998) (summary judgment upheld on Section 1983 taking and state damages claims); *Andrews v. McGowan*, 739 So. 2d 132 (Fla. 5th DCA 1999) (summary judgment upheld on conspiracy claim).

Petitioner has, in essence, addressed only one potential basis of the state appellate court's decision, to wit: that Petitioner's Section 1983 claims were not ripe due to the existence of an adequate state remedy of which the Petitioner did not avail itself.[4]

Where a state appellate court has given no reason for its decision, this Court has deemed it improper to accept jurisdiction if the state court decision "might have rested on a non-federal ground . . . . " *Ellis v. Dixon*, 349 U.S. 458, 459 (1955); *Piccirillo v. New York*, 400 U.S. 548 (1978); *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955). The record presented to the state court here supports its decision on several grounds, both federal and non-federal. As such, there is no basis for review by this Court. Likewise, if there are no facts in the record to support federal claims being advanced, this Court has declined to

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[4] The Fifth District Court of Appeal affirmed the order of the trial court without an opinion. The trial court's order granting summary judgment also did not set forth specific reasoning for its decision. (AI-5-6)

exercise its certiorari jurisdiction. *Ellis v. Dixon, supra* at 463-464.

In the first instance, there is simply no evidence in the record to support a claim that the Respondents, as private actors, participated in the series of events alleged by the Petitioner as amounting to a taking of its property aside from their role in ultimately seeking to negotiate a purchase of that property. The actions complained of were taken by the County pursuant to the County's powers and authority and were taken prior to the County's engagement of the services of Respondents. Putting aside all questions of ripeness, state action, "under color of law" requirements, the extent of regulation and just compensation, the record is simply devoid of any actions on the part of Respondents that would support a claim against them. Since the record would support the state courts' granting and affirmance of summary judgment on behalf of Respondents on this evidentiary basis alone, no federal question is presented.

Another argument presented to the state appellate court in support of the trial court's summary judgment was that even if certain governmental decisions had been made which were incorrect and which had some adverse effect on Petitioner's right to use its property in one particular manner, this did not rise to the level of a Section 1983 violation. This argument was made on the state court authority of *Paedae v. Escambia County, supra,* and *Jacobi v. City of Miami Beach,* 678 So. 2d 1365 (3d DCA 1996). This argument is not addressed in the Petition for Writ of Certiorari. Petitioner has thus waived any objection to this argument, an argument that could have supported the state appellate court decision in this case.

The ripeness issue – the only issue actually addressed in the Petition – also supports the state appellate court's decision in this case. Before Petitioner could bring a claim based upon the Fifth and Fourteenth Amendment Just Compensation Clause, it was first required to pursue and exhaust its available state remedy. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). As stated by this Court in *Williamson County, id.* at 194-195: "Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." See also *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997). Florida does have an adequate state remedy, that being an action for inverse condemnation. *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 640 So. 2d 54 (Fla. 1994). Since Florida recognizes the right to bring a cause of action for inverse condemnation, and Petitioner did bring such an action but did not complete it before bringing its Section 1983 action against Respondents, the action against Respondents was not ripe for review and summary judgment was properly entered.

Petitioner argues that Florida's remedy is inadequate for three reasons. Petitioner first argues (Pet. 21-22) that Florida's inverse condemnation remedy is inadequate because a state claim for inverse condemnation cannot be brought against a private entity acting in the role of a state actor. In Petitioner's view, the fact that inverse condemnation is an action only against a governmental entity thus preventing it from suing Respondents individually and seeking punitive damages renders Florida's

remedy inadequate. Petitioner cites neither authority nor logic in support of that position.

First, the evidence did not support Petitioner's position that Respondents were state actors. Private actors have been deemed state actors under Section 1983 only when one of three tests is met: 1) the public function test; 2) the state compulsion test; or 3) the nexus/join action test. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982); *Willis v. University Health Services, Inc.*, 993 F.2d 837, 840 (11th Cir. 1993), *cert. denied*, 510 U.S. 976 (1993); *Harvey v. Harvey*, 949 F.2d 1127, 1130 (11th Cir. 1992). Recently, this Court has identified excessive "public entwinement" as a basis for determining whether private actors may be considered state actors for Section 1983 purposes. *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001). None of these tests was met here. The negotiation for the purchase of land from a willing seller is not a function which is traditionally within the exclusive prerogative of the state. The fact that the function being exercised is serving the public is not sufficient to render Respondents state actors. *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982). As such, the public function test is not met. See *Harvey v. Harvey, supra; National Broadcasting Company, Inc. v. Communications Workers of America, AFL-CIO*, 860 F.2d 1022 (11th Cir. 1988). Similarly, there is no evidence in the record to support the claim that the state compulsion test is met. While Respondents were hired to negotiate favorable sales with willing sellers, there is no evidence that they were "willful participant[s] in joint activity with the State or its agents" insofar as the allegedly illegal acts of the County were concerned. *Lugar, supra* at 941. Finally, the record is devoid of facts to

establish the symbiotic relationship, which must involve the alleged constitutional violation, to support a finding that there existed such a "public entwinement" as to convert Respondents into state actors for Section 1983 purposes. Certainly, any "public entwinement" that existed here between Respondents and the County was significantly less, both in quantity and quality, than that existing in *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179 (1988) where the NCAA was found not to be a state actor even though a university, which was undoubtedly a state actor, delegated many of its own functions to the NCAA. See also, *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522 (1987). Respondents' only role in the complained of actions came at the end when they were engaged to negotiate a price for the property, not earlier when the regulatory actions which purportedly depressed the value of the property were engaged in by the County.

Nonetheless, the inability of Petitioner to bring an action against Respondents in state court *for inverse condemnation* does not render the state court remedy inadequate. The remedy spoken of by this Court in *Williamson County* is for "just compensation" for the taking of property by government. Florida provides a remedy, inverse condemnation, for Petitioner to seek just compensation from Brevard County. That in the *inverse condemnation* action Petitioner is precluded from suing private individuals and seeking punitive damages does not render the state remedy inadequate. Petitioner was free to seek other state court remedies against Respondents for any alleged wrongful conduct on their part which harmed it or interfered with its economic or property rights and, in a

timely and properly brought Section 1983 action Petitioner would also have been able to avail itself of the remedy of punitive damages if the facts would support such a remedy.

Petitioner next contends (Pet. 22-23) that the Florida inverse condemnation remedy is inadequate because Petitioner's claim for inverse condemnation cannot be tried before a jury. The procedure under Florida law is for a judge to first decide if there has been a taking before ordering a jury to be impaneled to determine just compensation. *Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc.*, 521 So. 2d 101 (Fla. 1988). Petitioner contends that in light of this Court's decision in *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687 (1999), any state remedy that does not provide for a jury trial on the issue of taking is inadequate. *City of Monterey*, however, not only does not support this position, but expressly contradicts it. The Court specifically noted that the Seventh Amendment right to a jury trial does not apply to the states. *Id.* at 719. Moreover, the Court's analysis reaffirms the position that if an adequate post-deprivation remedy to provide for just compensation exists, then no constitutional injury is occasioned by the taking alone and, as such, the jury trial issue does not come into play. *Id.* at 710. The Court has never held that for a state remedy to be adequate in this context it must provide for a full jury trial on all issues. Indeed, the Court has consistently held to the contrary. *Hudson v. Palmer*, 468 U.S. 517 (1984); *Parratt v. Taylor*, 451 U.S. 527, 543-544 (1981) (specifically noting that the fact that the state's remedies provide an action only against the state, no punitive damages and no right to a trial by jury does

not render the state's remedies inadequate).[5] Federal Courts of Appeals, including the Eleventh Circuit Court of Appeals which includes Florida, have applied the *Williamson County* state remedy requirement in cases analogous to the present case where a claim is made that a benefit once available to the property owner (like the MSBU ordinance here) has been taken away by government action thereby affecting the value of the property. See, e.g., *Anthony v. Franklin County*, 799 F.2d 681 (11th Cir. 1986) (termination of a county-operated ferry service to an otherwise inaccessible island); *Four Seasons Apartment v. City of Mayfield Heights, Ohio*, 775 F.2d 150 (6th Cir. 1985) (city's rescinding of a previously approved building permit). Accordingly, Petitioner's lack of entitlement to a jury trial under Florida's inverse condemnation law does not render the state remedy inadequate.

Petitioner also contends (Pet. 22-25) that Florida's remedies are inadequate in forcing mitigation sales. This issue is simply miscast and misstated. Contrary to Petitioner's representation (Pet. 23), the trial court did not hold that Petitioner's economically viable use of its property was not denied due to the possibility of "mitigation sales." As previously noted, the trial court's reasoning for its granting of summary judgment was not explained and it said nothing about mitigation sales. Similarly, the appellate court's *per curiam* affirmance was silent as to its reasoning. Nor is there any evidence in the record that

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[5] That portion of *Parratt v. Taylor* which held that negligence could give rise to an action under 42 U.S.C. § 1983 in the prison context was overruled by the Court in *Daniels v. Williams*, 474 U.S. 327 (1986).

any actions of these Respondents "forced" Petitioner into mitigation sales or that these Respondents had anything to do with establishing the system of mitigation sales. Nor have these Respondents at any time asserted that "mitigation sales" are a state remedy that Petitioner was required to pursue before it could bring a Section 1983 action. This argument is wholly without merit.

Finally, Petitioner has totally ignored its failure to address whether the County would interpret its ordinances to allow building permits on Petitioner's lots or allow any variances from those ordinances, i.e., its failure to meet the other ripeness requirement that it receive a final agency action. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, supra.* This, too, provides a basis for the state court's decision – an independent basis not challenged by Petitioner in this Court.

2. The gravamen of Petitioner's contentions regarding the conspiracy count (Pet. 25-30) is that Respondents conspired with Co-Respondent Brevard County to deny Petitioner just compensation for the taking of its property and equal protection[6] and that, as such, Respondents

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[6] Any argument Petitioner may have had with regard to equal protection was waived below and is not preserved for consideration in this Court. The Order of Dismissal in Petitioner's original action against Brevard County dismissed the equal protection count of that complaint with leave to amend. (AI-3-4) Petitioner did not seek to replead the equal protection count and has made no showing that it could not do so. The Second Amended Complaint, the operative pleading in this cause, does not even mention equal protection. In these circumstances, the equal protection issue is waived as a matter

were state actors acting under color of law for purposes of 42 U.S.C. § 1983.

Petitioner spends a great deal of time seeking to establish that Respondents and Brevard County were acting under color of state law. As noted above, the facts in this case fail to establish that Respondents were state actors. Respondents were clearly independent contractors, not employees of the County. *Harvey v. Harvey, supra.* Moreover, to the extent that the County took actions through the establishment of its EEL program and the modification of its MSBU ordinance allegedly rendering Petitioner's property sufficiently devalued due to regulation to implicate the Just Compensation Clause, Respondents, who were hired only to negotiate purchases with willing sellers, came on the scene *after* the purportedly actionable conduct. See, e.g., *Bendiburg v. Dempsey,* 909 F.2d 463, 469 (11th Cir. 1990). The well established authorities of this Court and the various federal Courts of Appeals simply do not support Petitioner's conclusory statement that ". . . TNC and Judd are state actors because they were executing a contractual agreement to acquire the real property of [Petitioner] and nearby landowners for wildlife preservation." (Pet. 27). More must be proven to establish Respondents as state actors, particularly state actors who are sought to be held liable for Section 1983 violations required to be taken under color of state law.

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of state law. *Arthur v. Hillsborough County Board of Criminal Justice,* 588 So. 2d 236 (Fla. 2d DCA 1991).

Petitioner's argument that there exist issues of material fact with respect to evidence of a conspiracy between Respondents and the County also fails to provide support for the granting of certiorari in this case. In the first place, the facts, even as inaccurately stated as they are by Petitioner, establish no actions taken by the Respondents other than their entry into a contract with the County to serve as a purchasing agent and their entry into negotiations pursuant to that contract. A review of the documents referenced by Petitioner – TNC's Statement of Qualifications and the contract between the County and TNC[7] – establish them as standard, lawful documents irrespective of the sinister spin the Petitioner seeks to place on them. Thus, even Petitioner's recitation of the alleged facts presented to the trial court fail to establish the essentials of a complaint for civil conspiracy. See *Kent v. Kent*, 431 So. 2d 279, 281 (Fla. 5th DCA 1983).

Of equal significance is the fact that the determination of whether the facts in the record at the time of the trial court's order of summary judgment truly supported that order or not, is a matter which, while of importance to the parties, does not raise issues of federal significance for this Court's determination.

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[7] Exhibits "I" and "K" to the Second Amended Complaint.

CONCLUSION

It is therefore respectfully submitted that the Petition for Writ of Certioari should be denied.

Respectfully submitted this 26th day of October, 2001.

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(5)

No. 01-531

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IN THE

Supreme Court of The United States

FARM & GROVE REALTY COMPANY,

Petitioner,

v.

BREVARD COUNTY, FLORIDA,
THE NATURE CONSERVANCY
and KEVIN JUDD,

Respondents.

On Petition for Writ of Certiorari to the Fifth District Court of Appeals for the State of Florida

RESPONDENT, BREVARD COUNTY'S BRIEF IN OPPOSITION

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JURISDICTION TO REVIEW

As discussed below, the reasons for review specified in the Petition fail to meet the criteria for the Court to exercise its certiorari discretion as specified in Rule 10(b) and (c), Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

With regard to the "Road Suit", the statement of the case presented by Farm & Grove Realty Company (F&G) is essentially correct. However, F&G failed to indicate that the trial court order dismissing Counts II through VII of the "Road Suit" expressly granted F&G leave to amend the complaint being dismissed. F&G also failed to point out that no amended complaint was ever filed in the "Road Suit" and that no final order of dismissal with prejudice was ever entered by the trial court. Moreover, F&G failed to note that the grounds for dismissal of the equal protection claim were not specified in either the trial court order or the Florida Fifth District Court of Appeal per curiam affirmation, although the trial court did note that the thrust of the "Road Suit" complaint was the "taking" issue.

STATEMENT OF THE FACTS

Brevard County does not entirely agree with the statement of facts presented by F&G, however, the County respectfully submits that the discrepancies are not germane to the County's argument that the petition fails to meet the review standards or jurisdictional requirements established for this Honorable Court, particularly since the first three issues raised by F&G pertain to an order dismissing the equal protection count in the "Road Suit" complaint, the allegations of which are deemed to be true for the purposes of reviewing the order granting the motion to dismiss. Those allegations are discussed in the text of the argument of the County's Point I. For the purposes of briefing points arguing against this Honorable Court's acceptance of discretionary review of the F&G petition, Brevard County will rely upon undisputed facts set forth in F&G's statement of facts. The County would reserve the right to point out any factual discrepancies in any future brief on the merits that might be required by this Honorable Court.

ARGUMENT FOR DENYING THE PETITION

I. F&G POINTS I, II AND III FAIL TO MEET THE DISCRETIONARY REVIEW STANDARDS SET FORTH IN RULE 10(b) AND (c) OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

In order to warrant this Honorable Court's exercise of discretionary review of the equal protection issues raised in Points I, II and III of the petition, F&G must demonstrate that the standards set forth in Rule 10(b) or (c) of the Rules of the Supreme Court of the United States have been met. Subparagraph (b) of the rule requires a demonstration that the state court's decision conflicts with the decision of another state court on an important federal question. Subparagraph (c) requires a demonstration that the state court has decided an important question of federal law that has not been settled or in a way that conflicts with prior Supreme Court decisions. The petition fails to meet the standard of either subparagraph for several reasons.

First, neither the trial court order dismissing the equal protection count in the "Road Suit" nor the per curiam affirmation of that order by Florida's Fifth District Court of Appeal articulate a reason for denying the equal protection claim. Although the trial court order questions ripeness of the takings claim, the order is silent on the grounds for dismissing the equal protection claim. Likewise, the per curiam affirmed decision of the appellate court offers no rationale for the affirmation. Under Florida law, the per curiam decision of the Fifth District therefore falls within the decisional rule that an appellate judgment per curiam consisting of the one word "affirmed" does not reflect a decision that would interfere with settled principles of law rendered by Florida's other appellate courts. *South Florida Hospital Corporation v. McCrea*, 118 So. 2d 25 (Fla. 1960). Likewise, the Florida Supreme Court has held that there is no limit to the grounds that may prompt a per curiam affirmed opinion. *Newmons v. Lake Worth Drainage District*, 87 So. 2d 49 (Fla. 1956).

Under Florida law, the variety of reasons that may have prompted the Fifth District's per curiam affirmed opinion make it is impossible for this Honorable Court to determine whether the Fifth District decision conflicts with the decision of another state court [Rule 10(b)] or the "way" in which the per curiam opinion settles a question of federal law [Rule 10(c)]. Therefore the petition fails to demonstrate compliance with the standards guiding this Honorable Court's exercise of discretionary jurisdiction.

Second, assuming this Honorable Court finds that a per curiam affirmed opinion establishes a legal principle sufficient to satisfy the "decision" requirement of the rules, the decision upholding dismissal of the equal protection claim does not conflict with the decisions of either another state or of this Court since the well-settled decisional law governing the equal protection issue raised in this case would support the lower court's disposition of the matter.

This equal protection claim involved the application of an "unpaved road" ordinance to a single 1.5 acre tract of rural land which has "paper" access by easement but no physical access (AI-60, ¶3-5). Since the application of government regulations or policies to real property does not implicate a fundamental right, *Villas of Lake Jackson, Ltd. v. Leon County*, 884 F.Supp. 1544 (N.D. Fla. 1995), *affirmed* in *Villa of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610 (11th Cir. 1997); *Executive 100, Inc. v. Martin County*, 922 F.2d 1536 (11th Cir. 1991), to plead a cognizable equal protection claim for disparate treatment under the facts at bar, F&G must allege that (1) it has been intentionally treated differently from others similarly situated and (2) that there is no rational basis for the difference in treatment. *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1068 (2000).

F&G failed to plead either of these *Olech* elements in its original "Road Suit" and failed to amend the dismissed complaint to incorporate such allegations. Nowhere in the "Road Suit" complaint does F&G allege that it has received disparate treatment, much less intentionally disparate treatment. The complaint merely alleges, on its face and through attached exhibits incorporated in the complaint, that all homes constructed in Brevard County must be served by a county-approved road (AI-61, ¶8); that the County Commission directed its staff not to use the MSBU special assessment program to fund private development of any kind in undeveloped areas (AI-62, ¶12; AI-59, Ex. C); and that all owners of lots in undeveloped areas must comply with the requirements of the unpaved road ordinance (AI 62-63, ¶13; AI 54-58 subparagraph c). Not only can it be inferred from the allegations of the complaint that, like F&G, all owners of rural lots without physical access are treated the same under the applicable ordinances, there is a complete absence of any allegation of intentional disparate treatment specifically directed at F&G. The trial court's dismissal of the complaint with leave to amend was therefore supported by, not in conflict with, the prior decisions of this Court. *Village of Willowbrook, supra.*

Moreover, under the rational basis test applied by this Court in garden variety equal protection claims, classifications established through the application of a regulation or policy must be upheld against an equal protection challenge if they are rationally related to a legitimate governmental interest. *City of Dallas v. Stanglin*, 490 U.S. 19, 109 S.Ct.1591, 104 L.Ed.2d18 (1989); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d. 797 (1974). Under rational basis analysis, if there is any reasonably conceivable set of facts that could provide a rational basis for the classification, the ordinance creating the classification must be upheld. Moreover, it is the burden of the challenger to disprove every conceivable basis which might support the classification. *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961).

The facts alleged on the face of the "Road Suit" complaint reveal two grounds for dismissal that substantiate the judgement of both state courts under the rational basis analysis of equal protection claims established by this Court. First, Ordinance 93-27, attached as Exhibit D to the complaint (AI 50-59), expressly states that the purpose of the ordinance was ". . . to expand the criteria for the uses of unpaved roads to allow limited growth in rural residential areas while preventing urban sprawl . . ." (A 50). The discouragement of the proliferation of urban sprawl is one of the expressly articulated state administrative rules applied to local government comprehensive plans under Florida's comprehensive planning statutes. *See, Home Builders and Contractors Ass'n of Brevard, Inc. v. Department of Community Affairs*, 585 So. 2d 965 (Fla. 1st DCA 1991). The ordinance restrictions on road construction in rural areas therefore, on their face, are rationally related to the legitimate state interest in discouraging the proliferation of urban sprawl.

Second, there is no allegation in the "Road Suit" complaint that F&G, to the exclusion of every other lot owner on the easement in question, was the only lot owner subject to Ordinance 93-27. In fact, by its terms, the ordinance applies to all owners of lots along the easement that serves F&G's single lot.

Finally, the County has no constitutional duty to establish a discretionary special assessment program that would charge abutting property owners a pro rata share of the cost for developing a road that would serve F&G's private, rural lot. The County's choice not to finance the cost to extend roads serving a single rural lot purchased without physical access is also rationally related to the legitimate state interest of discouraging urban sprawl.

In view of the foregoing, the rational basis justifying the County's actions appear on the face of the complaint thereby warranting dismissal by the trial court under equal protection principles already established by this Court. Therefore, F&G's complaint fails to meet the standards of Rule 10(b) or (c) since the lower court's decision conforms to this Court's existing decisions and the state court decision under review in this case does not involve any federal question that has not been already been settled by this Court.

Brevard County therefore respectfully submits that F&G has not met the standards for discretionary review established by this Honorable Court with regard to Points I, II and III.

II. F&G POINT IV FAILS TO MEET THE RULE 10(b) and (c) STANDARDS FOR DISCRETIONARY REVIEW.

F&G Point IV suffers from the same "per curiam" infirmity raised in the argument set forth in the County's Point I, above. Under Florida law, a per curiam affirmation without opinion does not reflect a decision that would interfere with settled principles of law rendered by Florida appellate courts. *South Florida Hospital Corporation v. McCrea*, 118 So. 2d 25 (Fla. 1960). Therefore F&G cannot show how the per curiam affirmation of the Fifth District Court of Appeal, without opinion, can be demonstrated to conflict with the decisions of another state court or with the decisions of this Court. Likewise, if the per curiam affirmation does not reflect a "decision" under principles of Florida law, F&G cannot credibly claim that such a per curiam affirmation "decides" an important question of federal law that is unsettled. F&G therefore fails to demonstrate compliance with Rule 10(b) and (c) of the Rules of the Supreme Court of the United States. Brevard County respectfully submits that discretionary review should therefore be denied.

Assuming the per curiam affirmation was reviewable and this Honorable Court was able to divine from that affirmation that the ripeness issue was the determining factor that prompted the Fifth District Court of Appeal to uphold a trial court order granting summary judgment in which the grounds for granting summary judgment were not even specified, F&G still fails to meet the standards for review established in Rule 10(b) and (c) because the ripeness doctrine is well-settled in prior "takings" cases decided by this Honorable Court. The federal ripeness doctrine focuses on the necessity to pursue state procedures for seeking just compensation prior to seeking a Fifth Amendment takings claim under 42 U.S.C.A. §1983. *Williamson County Regional Planning Commission v. Hamilton Bank of*

Johnson City, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). Florida's procedure for inverse condemnation requires a bifurcated proceeding in which the "takings" determination must first be made by the trial court and, if a taking is deemed to exist, a jury trial follows at which just compensation is determined. *Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc.*, 521 So. 2d 101 (Fla. 1988) [in inverse condemnation suit, trial court decides whether taking has occurred and jury decides what is just compensation]. Since, under Florida law, a plaintiff whose property has allegedly been taken can seek just compensation by following this bifurcated procedure, it is well established under *Williamson County Regional Planning Commission* and its progeny that any Fifth Amendment takings claim cannot be pursued under 42 U.S.C.A. §1983 until the Florida procedure is exhausted.

Given the well-settled status of the federal ripeness doctrine, F&G's ripeness issue (Point IV) fails to meet the Rule 10(b) and (c) standards for discretionary review and Brevard County submits that such review should be denied.

III. THIS HONORABLE COURT LACKS JURISDICTION TO REVIEW F&G POINT V RELATING TO THE CONSPIRACY COUNT IN THE "TAKINGS SUIT". F&G POINT V ALSO FAILS TO MEET THE RULE 10(b) AND (c) DISCRETIONARY REVIEW STANDARDS.

F&G Point V relates to the summary judgment granted on the state civil conspiracy claim alleged as Count III of the "Takings Suit". This issue suffers from the same failings as the other issues raised in the F&G's petition, with regard to the lack of decisional status of a per curiam affirmed opinion, the satisfaction of the well-settled rational basis equal protection analysis and the availability of a state just compensation procedure that satisfies the well-settled federal ripeness doctrine, as previously argued in Brevard County Points I and II, above. The County incorporates its argument on those issues here and asserts that discretionary review of F&G Point V should also be denied for failure to satisfy the standards of Rule 10(b) and (c) of the Rules of the Supreme Court of the United States.

In addition, Brevard County would raise two other points. First, contrary to F&G's unsupported statement to the contrary at page 25 of the petition, Count III of the "Takings Suit" was plead as a civil conspiracy tort claim under state law and not as a 42 U.S.C.A. §1983 claim (AII-16). The jurisdiction of this Honorable Court under 28 U.S.C.A. §1257, as asserted by

F&G, does not extend to state tort claims since, under that jurisdictional statute, only a right, privilege, or immunity set up or claimed under the Constitution or statutes of the United States are reviewable. This Honorable Court therefore lacks jurisdiction to review the state court's disposition of the state civil conspiracy claim.

Second, F&G promotes a Rule 56 analysis of the order granting summary judgment on the conspiracy count (Petition p. 25). Rule 56 is a rule of federal civil procedure that does not govern the state trial court's disposition of the motions for summary judgment filed in that court. Consequently, F&G's attempt to seek this Honorable Court's review of the Fifth District Court of Appeal per curiam affirmation of the trial court's order under the Rule 56 standard is beyond the scope of the jurisdiction or discretionary review standards established for the Court.

CONCLUSION

For all of the foregoing reasons, Respondent, Brevard County, Florida, respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

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